88-1059

Supreme Court, U.S.
FILED
DEC 21 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

VROOM DEVELOPMENTS (FLORIDA), INC., *Appellant*,

v.

TOWN OF LONGBOAT KEY, *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

JURISDICTIONAL STATEMENT

JIM D. SYPRETT
THOMAS F. CAPSHEW
JAMES H. BURGESS, JR.
SYPRETT, MESHAD, RESNICK & LIEB, P.A.
1900 Ringling Boulevard
Sarasota, Florida 34236
(813) 365-7171
Counsel for Appellant

December 21, 1988

QUESTIONS PRESENTED

I. Whether the Town of Longboat Key's application of its Ordinance 81-27 is repugnant to the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States when an impact fee to be used to acquire designated park land is assessed against a developer based upon the value of the development land rather than the development's pro rata share of the cost of acquiring the designated park land.

II. Whether the Town of Longboat Key's application of its Ordinance 81-27 is repugnant to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States when the Ordinance states that an impact fee shall be based upon the value of the designated park land but the Town exacts the fee based upon the value of the development land.

III. Whether an analysis of the Town of Longboat Key's Ordinance 81-27 under Florida's "rational nexus test," which requires an impact fee to offset but not exceed the park land needs attributable to the population impact of a development, and to be applied for the benefit of the new residents of the development, precludes challenges of the impact fee and Ordinance based upon federal constitutional guarantees.

No parties have been omitted from the caption. There were no other parties in any of the proceedings below. Pursuant to Sup. Ct. R. 28.1, the following is a listing of all parent companies, subsidiaries and affiliates of Appellant, Vroom Developments (Florida), Inc. The parent company of Appellant Vroom Developments (Florida), Inc. is The Vroom Corporation, Inc., a Delaware Corporation. The parent company of The Vroom Corporation, Inc. is The Vroom Corporation Limited, an Ontario Corporation. Appellant, Vroom Developments (Florida), Inc. has no other affiliates and no subsidiaries.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

VROOM DEVELOPMENTS (FLORIDA), INC., *Appellant,*

v.

TOWN OF LONGBOAT KEY, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

JURISDICTIONAL STATEMENT

Vroom Developments (Florida), Inc., the appellant, appeals from the final decision of the District Court of Appeal, Second District, State of Florida, dated September 22, 1988, denying appellant's motion for rehearing, motion for rehearing en banc, and motion for certification of the District Court of Appeal, Second District's previous decision which affirmed, without opinion, the trial court's holding that the Town of Longboat Key's assessment of a fee in lieu of dedication of park land was not a violation of appellant's equal protection and due process rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The final amended order of the District Court of Appeal, Second District, State of Florida, denying appellant's motions is not reported. It is reprinted in the appendix hereto, p. 1a, *infra*. (The original order, dated the same day, had an incorrect listing of Judges. p. 2a, *infra*.) The decision of the District Court of Appeal, Second District, State of Florida, affirming without opinion, the trial court's final judgment is reported in a table at 531 So.2d 974 (Fla. 2d DCA 1988), and appears in the appendix hereto, p. 3a, *infra*.

The Final Judgment of the trial court, dated June 8, 1987, is not reported. It is reprinted in the appendix hereto, p.4a, *infra*.

JURISDICTION

The decision of the District Court of Appeal, Second District, State of Florida, affirming without opinion the trial court's order, finding the Town of Longboat Key's application of the ordinance not repugnant to the Constitution of the United States, was entered on June 24, 1988. See p. 3a, *infra*. A motion for rehearing, a motion for rehearing en banc, and a motion for certification were entertained and denied on September 22, 1988. See p. 1a, *infra*.

Pursuant to Fla. R. App. P. 9.030, the decision of the District Court of Appeal is not reviewable by any higher court in the state of Florida. See *Williams v. Florida*, 399 U.S. 78, 80 fn. 5 (1970).

A notice of appeal to this Court was timely filed in the District Court of Appeal, Second District, State of Florida, on December 15, 1988. See p. 8a, *infra*. A notice of appeal to this Court was timely filed in the Circuit Court in and for the Twelfth Circuit, Sarasota County, the court possessed of the record, on December 13, 1988. See p. 10a, *infra*.

This appeal is being docketed in this Court within ninety (90) days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

Fourteenth Amendment, United States Constitution:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ordinance No. 80-1, Town of Longboat Key:

> * * *
>
> Section 1. The map entitled "Open Space Master Plan" attached hereto is made a part of this Ordinance and hereby adopted. Said map properly attested shall be on file in the office of the Town Clerk inventorying land recommended for acquisition by the Town. * * *

Ordinance No. 81-27, Town of Longboat Key:

> * * *
>
> Section 1. * * *
>
> A. Purpose: This ordinance is enacted to ensure that future land development within the Town of Longboat Key preserves or provides land in its natural state for parks and open space required by the Longboat Key 1978 Comprehensive Plan, including Section 3 thereof entitled "Open Space and Recreation Element" and in the Capital Improvement Program of that Plan and are more particularly set forth in the "Open Space Master Plan" concurrently adopted with Ordinance 80-1 of the Town of Longboat Key.
>
> B. * * *
>
> 3. Requirements. As a condition precedent to the grant of any permits following approval of final development plans, site plans, subdivision plats, or issuance of a building permit, the developer shall deed land to the Town of Longboat Key, pay a money fee in lieu thereof or provide a combination of the above, at the option of the Town Com-

mission, to be used for parks and open space specified in this Ordinance and according to the standards and formula set forth in this Ordinance.

4. General Standard; Formula.

(a) It is hereby found and determined that the public interest, convenience, health, welfare and safety require that five (5) acres of land or equivalent money value be deeded or paid to the Town for each one thousand (1,000) persons residing in the Town to be devoted for said park and open space for purposes of this ordinance.

* * *

5. Formula for Fees in lieu of land conveyance.

(a) If it is determined that the proposed development does not include any land designated by the Open Space Master Plan as open space, to serve the immediate and future needs of the Town residents and the developer is unwilling or unable to deed to the Town lands outside the proposed development that are so designated, then the developer shall, in lieu of conveying land, pay a fee to the Town equal to the value of the land acreage that would otherwise have been required to be conveyed as determined by the formula herein, and in an amount determined in accordance with the provisions set out below, such fee to be used by the Town for acquisition of land and parks and open space which is intended to exclusvely serve the residents of the Town of Longboat Key.

(b) The provisions of this subsection shall automatically apply to all developments of twenty-five (25) dwelling units or less.

* * *

(Both Ordinance 80-1 and Ordinance 81-27 are reprinted in their entirety in the appendix hereto, p. 27a and p. 35a, *infra*.)

HOW THE FEDERAL QUESTION WAS RAISED

In the original complaint filed in the trial court below, appellant raised the federal questions raised in this appeal by alleging that Ordinance 80-1 and Ordinance 81-27 violate the "due process clause of the United States Constitution in the Fifth and Fourteenth Amendments." Appellant further alleged that the ordinances denied appellant "equal protection under the law...in violation of the Fourteenth Amendment to the United States Constitution." Each count of the Complaint contained a prayer that the court "[i]ssue a judgment declaring [the ordinances] unconstitutional and therefore null and void."

The trial court's final judgment stated that the ordinance would pass "federal and Florida constitutional muster if it meets the rational nexus test as analyzed in *Contractors and Builders Ass'n. v. City of Dunedin*, 329 So.2d 314, (Fla. 1976) [*cert. denied* 444 U.S. 867 (1979)] and *Hollywood, Inc. v. Broward County*, 431 So.2d 606, (Fla. 4th DCA 1983) [pet. rev. denied 440 So.2d 352 (Fla. 1983)]." The court went on to hold that "[t]he evidence established at trial convincingly shows that Ordinance 81-27 is constitutional and passes both prongs of the rational nexus test," and because it meets the standards of the test, it "is thus impervious to the constitutional attacks brought by [appellant]."

Appellant renewed the federal challenges raised at trial in its appeal to the District Court of Appeal, Second District, State of Florida. See certified copies of the issues raised on appeal, pp. 13a - 15a, *infra*. The distinction between the question of whether the ordinances meet the state constitutional "rational nexus test" and the question of whether the ordinances are repugnant to federal constitutional provisions was most clearly drawn in appellant's motion for rehearing and motion for certification, filed with the District Court of Appeal, Second District. See pp. 17a - 21a, 25a - 26a, *infra*. In both of those motions, the issue was presented that even if the ordinances pass state constitutional muster by meeting the "rational nexus" test, the ordinances still violate federal due process and equal protection constitutional provisions.

STATEMENT OF THE CASE

The appellant, Vroom Developments (Florida), Inc., is a Florida corporation engaged in the business of developing property. Appellant owned two parcels of real property on Longboat Key which front the Gulf of Mexico. Appellant had plans to develop one of the parcels into a 26 unit condominium named Longboat Cove. The other parcel was to be developed into a nine (9) unit condominium named Pelican Harbor. Neither parcel included land designated for acquisition by appellee pursuant to its "Open Space Master Plan."

In order to receive a building permit for each of the projects, appellee required appellant to pay a fee in lieu of dedication of open space or park lands, based upon Ordinances 80-1, 80-9 and 81-27. Appellee assessed an "in lieu" fee of $21,448.44 against appellant for the nine (9) unit Pelican Harbor development. Appellee assessed an "in lieu" fee of $61,962.35 against appellant for the 26 unit Longboat Cove development. Appellant paid the fees under protest and initiated this action to have the Ordinances and appellee's application of them declared unconstitutional on both state and federal grounds.

Prior to trial, the parties stipulated to several matters. The parties stipulated that the amendments set forth in Ordinance 81-27 apply to this case. The parties stipulated that five (5) acres of park or open space land per 1,000 population increase was a reasonable standard to offset the impact of the increased population. The formula adopted by appellee in Ordinance 81-27 requires .01 acres per dwelling unit for single family, duplex, and multi-family developments. See Ordinance 81-27, Section 1, B4(C), p. 37a, *infra*.

The evidence produced at trial may be fairly summarized as follows:

(1) The appellant presented expert witness testimony of a real estate appraiser, who testified that the value of the land designated in the "Open Space Master Plan" equaled $1.00 per square foot.

(2) The impact fee paid by appellant for the two developments equaled $5.47 per square foot, or $2,762.00 per dwelling unit. The impact fee assessment was based on the value of the land being developed rather than the value of the lands earmarked for acquisition by appellee in its then-current "Open Space Master Plan."

(3) Appellant's expert testified that the value of the designated land was "far less" than the value of appellant's land. He also testified that under appellee's application of the ordinance, one development with an impact identical to a second development could pay twice the fee assessed against the second development.

(4) The appellee presented expert witness testimony of a land economist, who testified that the impact fee paid by the appellant was no greater than the per dwelling unit cost of parks and open space currently provided to the existing population. The expert witness used an impact fee methodology known as the "per capita" or "replacement" methodology. He testified that appellee's current inventory of open space and recreation lands was 14 acres per 1,000 which translates to $2,996.00 per dwelling unit. The "current inventory" used by the expert witness only included lands already acquired by appellee, and did not include any lands designated to be acquired with the funds raised from the impact fee assessment. The expert witness further testified that the impact fee paid by appellant was $2,762.00, which was less than the current per dwelling unit investment.

The Trial Court found that the assessment met the two-pronged "rational nexus test" (a state constitutional test) and "is thus impervious to the constitutional attacks brought by [appellant]." See Final Judgment, p. 4a, *infra.*

THE QUESTION IS SUBSTANTIAL

The question of whether a municipality can assess an impact fee based on the value of the land being developed rather than based on the development's pro-rata share of the capital improvement without violating federal constitutional standards is a novel and substantial one. It has never been treated before by this Court.

Citizens of this country have a reasonable expectation of being provided with the accoutrements of civilization, including road systems, parks, public facilities, police and fire protection, libraries, and schools. Funding for these trappings of a civilized society is expected to come from national, state and local governmental entities. Earlier cases decided by this Court imposed federal constitutional constraints on local governments' imposition of special tax assessments to fund

capital improvements. *Butters v. City of Oakland*, 263 U.S. 162 (1923) (upholding the City of Oakland's special tax assessment for street improvement where the assessment was allocated to individual property owners based upon the benefit received); *Myles Salt Company v. Board of Commissioners*, 239 U.S. 478 (1916) (holding that federal constitutional provisions are violated when a special tax assessment to fund a drainage system in a special drainage district is levied against property located within the district but not benefited by the drainage system); and *Paulsen v. City of Portland*, 149 U.S. 30 (1893) (holding that the notice given for a special tax assessment to pay for a newly constructed sewer met the due process requirements of the federal Constitution).

In the last twenty (20) years, citizens have become increasingly critical of, and recalcitrant in, paying taxes at the state and federal levels. This taxpayer revolt has caused a corresponding stricture in the flow of federal and state funding. In growing communities, the demand for capital improvements continues unabated. As extra-territorial funding diminishes, some states have enacted enabling legislation to allow local governments to generate funding for the accoutrements of civilization. See, *eg.* Me. Rev. Stat. Ann. tit. 30, Section 4961-A (West Supp. 1988).

Early challenges of impact fees focused on the enabling legislation and whether the governmental entity had the authority to impose such a fee. These challenges continue to arise. See, *eg.*, *New Jersey Builders Ass'n. v. Bernards Township*, 108 N.J. 223, 528 A.2d 555 (1987) (holding that a municipal ordinance assessing an impact fee for road improvement was an invalid exercise of municipal authority).

Counties and municipalities continue to extract impact fees for the projects traditionally funded by impact fees. See, *eg. Loup - Miller Construction v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984) (upholding the constitutionality of an ordinance governing charges and fees to finance Denver's sanitary sewer facilities); and *Call v. City of West Jordan*, 727 P.2d 180 (Utah 1986) (holding an ordinance imposing an impact fee for the acquisition of park lands and land for flood control was not properly enacted by the municipality).

Recent cases indicate that impact fees have gained a broader range of application, especially in the growth states. The City and County of San Francisco has imposed an impact fee upon new downtown office buildings based upon the new development's impact of increased de-

mand for public transportation downtown. *Russ Bldg. Partnership v. San Francisco,* 44 Cal.3d 839,750 P.2d 324, 244 Cal.Rptr. 682 (1988). The impact fee assessed against two of the developers was approximately 2.4 million dollars each. *Id.*, 750 P.2d at 326, n.5. The ordinance described the purpose of the assessment as providing revenue for the municipal railway. *Id.*, at 326. The state of California has enacted legislation authorizing Orange County and cities located therein "to impose fees as a condition of subdivision map approval or building permit issuance, with the fees to be used to defray the cost of constructing major thoroughfares and bridges to service the new development." *Committee of Seven Thousand v. Superior Ct.* 45 Cal.3d 491, 754 P.2d 708, 247 Cal.Rptr. 362 (1988), referencing Cal. Gov't Code, Section 66484.3 (West Supp. 1988).

In some states, such as Florida, no enabling legislation has been passed by the State Legislature, leaving the development of the parameters of the constitutionality of various impact fee assessments to the courts. The issues presented in this case need to be addressed by this Court to reinforce the fact that citizens of this nation have federal constitutional rights separate from, and independent of, state constitutional rights.

Many cases have challenged the imposition of an impact fee as a taking of property without due process of law. See generally Juergensmeyer & Gragg, *Limiting Population Growth in Florida and the Nation: the Constitutional Issues,* 26 U. Fla. L. Rev. 758, 772 (1974), and cases cited therein. This Court has recently addressed a similar issue. In a 5 - 4 decision two terms ago, this Court decided that requiring a property owner to convey an easement as a condition of obtaining a land use permit constituted a "taking" within the meaning of the Fifth Amendment when there is no "nexus" between the condition imposed and the original purpose of the building restriction. *Nollan v. California Coastal Comm'n.*, 107 S.Ct. 3141 (1987). This Court has also held that zoning ordinances regulating land use do not rise to the level of a "taking" when the ordinance does not prevent the best use of the land or extinguish a fundamental attribute of ownership. *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980). This Court has not addressed, however, the issue of whether a land use regulation which does not rise to the level of a "taking" must still comply with due process and equal protection requirements of the Constitution of the United States.

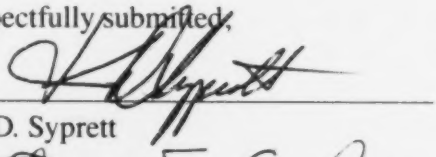
California has characterized impact fees as a tax. *Committee of Seven Thousand,* 754 P.2d at 709. Florida has expressly ruled that impact fees are not a tax, but a fee for services rendered. *Contractors and Builders Ass'n. v. City of Dunedin*, 329 So.2d, 314, 317 (Fla. 1976). Justice Blackmun stated in his dissenting opinion in *Nollan:* "The land-use problems this country faces require creative solutions." 107 S.Ct. at 3162. Whatever characterization of impact fees is used, and whatever creative solutions are spawned, governmental entities imposing fees as a condition of allowing development need guidance in delineating the parameters of the powers bestowed upon them.

The questions presented in this case are not only substantial, but also straight forward. As the cases in this area develop both in the federal court system and the state court systems, it is imperative that there be a precedent established by the highest court in this land that addresses the federal constitutional questions raised by the imposition of impact fees irrespective of the state constitutional and legislative restrictions.

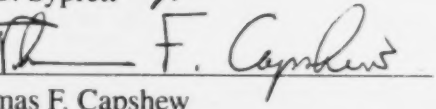
CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

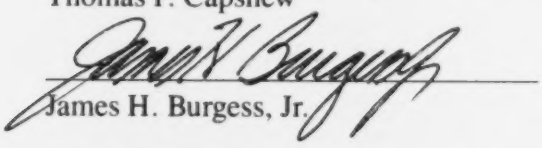
Respectfully submitted,



Jim D. Syprett



Thomas F. Capshew



James H. Burgess, Jr.

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1900 Ringling Boulevard
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(813) 365-7171
Attorneys for Appellant

AFFIDAVIT OF SERVICE

STATE OF FLORIDA
COUNTY OF SARASOTA

On this day personally appeared Thomas F. Capshew, who was duly sworn and states that service of this Jurisdictional Statement was made by regular U.S. Mail on this 21st day of December, 1988, pursuant to Rule 10.2 and Rule 28.5(c) of the Supreme Court Rules, on Scott R. Christiansen, Esq., 1487 Second Street, Sarasota, Florida 34236 and Nancy E. Stroud, Esq., 1900 Glades Road, Suite 350, Boca Raton, Florida 33431. All parties required to be served have been served.

Thomas F. Capshew
SYPRETT, MESHAD, RESNICK
& LIEB, P.A.
1900 Ringling Boulevard
P.O. Box 1238
Sarasota, Florida 34236
(813) 365-7171
Attorneys for Appellant

SWORN TO and subscribed in my presence, this 21st day of December, 1988.

NOTARY PUBLIC

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. APR.19,1992
BONDED THRU GENERAL INS. UND.

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IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA
SEPTEMBER 22, 1988

VROOM DEVELOPMENTS (FLORIDA), Appellant, v. TOWN OF LONGBOAT KEY, Appellee.	Amended Order Case No. 87-2553

Counsel for appellant having filed a motion for rehearing and motion for rehearing en banc in the above-styled case, upon consideration, it is

ORDERED that said motions are hereby denied. It is further

ORDERED that appellants' motion for certification is hereby denied.

SCHOONOVER, A.C.J., and PARKER, J., Concur.
HALL, J., would grant motion for certification.

A TRUE COPY
ATTEST
/s/ WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Jim D. Syprett, Esquire
Scott Christiansen, Esquire
Nancy E. Stroud, Esquire

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA
SEPTEMBER 22, 1988

VROOM DEVELOPMENTS
(FLORIDA), INC.,
Appellant,
v.
TOWN OF LONGBOAT KEY,
Appellee.

Case No. 87-2553

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SCHEB, A.C.J., and PARKER, J., Concur.
HALL, J., would grant motion for certification.

A TRUE COPY
ATTEST
/s/ WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: Jim D. Syprett, Esquire
Scott Christiansen, Esquire
Nancy E. Stroud, Esquire

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

VROOM DEVELOPMENTS (FLORIDA), INC.,
Appellant,
v.
TOWN OF LONGBOAT KEY,
Appellee.

Case No. 87-2553

Opinion filed June 24, 1988.

Appeal from Circuit Court for Sarasota County; Andrew D. Owens, Jr., Judge.

Jim D. Syprett
of Syprett, Meshad, Resnick & Lieb, P.A., Sarasota,
for the Appellant.

Nancy E. Stroud
of Burke, Bosselman & Weaver, Boca Raton,
for the Appellee.

PER CURIAM.

Affirmed.

SCHOONOVER, A.C.J., and HALL and PARKER, JJ., Concur.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY, FLORIDA

VROOM DEVELOPMENTS (FLORIDA), INC. (VROOM), Plaintiff, vs. TOWN OF LONGBOAT KEY, Defendant.	CASE NO. 84-3836-CA-01

FINAL JUDGMENT

THIS MATTER came for trial before the Court without a jury with the plaintiff, VROOM DEVELOPMENTS, INC., being represented by James D. Syprett, and the defendant, Town of Longboat Key, being represented by Nancy E. Stroud and Scott R. Christiansen. Upon the evidence presented it is hereby

ORDERED AND ADJUDGED as follows:

1. The Town of Longboat Key (the "Town") enacted its Parks and Open Space Acquisition Ordinance, No. 81-27, (the "Ordinance") to ensure that land within the Town remains available for parks and open space. The Ordinance requires that five (5) acres of land be deeded or an equivalent sum of money paid by the developer to the Town for every one thousand persons residing in a proposed development. The land deeded or money paid must be devoted for parks and open space purposes. The land to be dedicated to the Town may be located either within or outside the boundaries of the development at issue. An in lieu fee must be in an amount equal to the value of the land that otherwise would have been dedicated under the Ordinance. The Commission's choice of land or fee is based on a number of listed factors pertaining to the desirability of land proposed for dedication.

2. On the basis of the Ordinance plaintiff was assessed a fee of

$21,448.44 in lieu of dedicating land for the nine units in its Pelican Harbor development. An in lieu fee of $61,962.35 was charged for the twenty six units of plaintiff's Longboat Cove development. Plaintiff paid both in lieu fees under protest.

3. Plaintiff brought suit against the Town challenging the constitutionality of Ordinance 81-27. Plaintiff claims the Ordinance violates its due process and equal protection rights; that is unconstitutional, vague and indefinite; that it takes property without just compensation; and that it is an improper tax in violation of Article 7, Section 2 of the Florida Constitution.

4. Ordinance 81-27 passes federal and Florida constitutional muster if it meets the "rational nexus test" as analyzed in Contractors & Builders Ass'n., v. City of Dunedin, 329 So.2d 314 (Fla. 1976) and Hollywood, Inc., v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983). The rational nexus test requires a two-pronged analysis for land development regulations of this type: first, whether there is a rational nexus between the need for additional open space and parks and the population growth generated by the development; second, whether the land or in lieu payment is earmarked so that the residents of the development in question receive a reasonable benefit from the land or fee provided.

5. The evidence established at trial convincingly shows that Ordinance 81-27 is constitutional and passes both prongs of the rational nexus test.

6. The Ordinance meets the first prong by reasonably offsetting the park and open space needs created by new development. The Town's expert witness, Dr. James Nicholas, provided credible testimony that the fee in lieu requirement of the ordinance met this first prong under two different methods. First, the five acres per 1000 residents standard of the Ordinance was shown to be not more than what is currently provided residents of the Town.

Second, Dr. Nicholas' testimony demonstrated the reasonableness of the Ordinance under the "replacement value" approach commonly used for impact fee ordinances. Under this approach the current inventory of parks and open space lands and facilities are valued at an ad-

justed or "current year" value. The credible evidence established that the fee paid by plaintiff is less than the park and open space replacement value for an average dwelling unit. Furthermore, the cost for plaintiff's two projects would be greater than average because the size of the units in those projects is greater than the average size of units on Longboat Key.

The first prong of the rational nexus test is thus met because the fee paid by plaintiff was reasonably necessary to offset the park and open space needs created by the new development.

7. Ordinance 81-27 meets the second prong of the rational nexus test by properly earmarking the fees received and sufficiently benefiting the residents of plaintiffs' Longboat Cove and Pelican Harbor projects. Both Dr. Nicholas and Ms. Ann Satterthwaite provided credible testimony showing that new residents living in plaintiff's developments would receive a reasonable benefit from the park and open space land created by the Ordinance. The Ordinance itself provides that all in lieu fees will be placed in an earmarked account to be used and expended solely for the acquisition, improvement, and expansion of Town parks and open space land. The Ordinance thus provides both the benefit and earmarking required by the second prong of the rational nexus test.

8. Ordinance 81-27 meets the standards of the rational nexus test and is thus impervious to the constitutional attacks brought by plaintiff.

9. Plaintiff, VROOM DEVELOPMENTS, INC., shall take nothing by its complaint and the defendant, TOWN OF LONGBOAT KEY, shall go hence without day.

10. Jurisdiction is reserved for the taxation of the costs of this action upon proper motion.

ORDERED at Sarasota, Sarasota County, Florida, this 8th day of June, 1987.

/s/ Andy Owens
Circuit Judge

Copies Furnished To:
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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

VROOM DEVELOPMENT
(FLORIDA), INC.,
Appellant,
v.
TOWN OF LONGBOAT KEY,
Appellee.

FILED
'88 DEC. 15

NO. _____

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Vroom Development (Florida), Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final decision of the District Court of Appeal, Second District, State of Florida, denying Appellant's Motion for Rehearing, Motion for Rehearing En Banc, and Motion for Certification to the Florida Supreme Court, entered in this action on September 22, 1988.

This Appeal is taken pursuant to 28 U.S.C. 1257(2).

AFFIDAVIT OF SERVICE

STATE OF FLORIDA
COUNTY OF SARASOTA

On this day personally appeared Thomas F. Capshew, who was duly sworn and states that service of this Notice of Appeal to the Supreme Court of the United States was made by regular U.S. Mail on this 12th day of December, 1988, pursuant to Rule 10.2 and Rule 28.5(c) of the Supreme Court Rules, on Scott R. Christiansen, Esq., 1487 Second Street, Sarasota, Florida 34236 and Nancy E. Stroud, Esq., 1900 Glades Road, Suite 350, Boca Raton, Florida 33431. All parties required to be served have been served.

/s/ Thomas F. Capshew
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& LIEB, P.A.
1900 Ringling Boulevard
P.O. Box 1238
Sarasota, Florida 34236
(813) 365-7171
Attorneys for Appellant

SWORN TO and subscribed in my presence this 12th day of December, 1988.

/s/John D. Dumbaugh (SEAL)
NOTARY PUBLIC STATE OF FLORIDA
My commission expires: March 2, 1991
Bonded through Notary Public Underwriters

STATE OF FLORIDA
COUNTY OF POLK

This copy is a true copy of original Notice of Appeal on file in this office. Witness, my hand and official seal this 15th day of December, 1988.

/s/ William A. Haddad
Clerk
Second District Court of Appeal

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR SARASOTA COUNTY, FLORIDA

VROOM DEVELOPMENT
(FLORIDA), INC.,
Appellant,
v.
TOWN OF LONGBOAT KEY,
Appellee.

NO. 84-3836-CA-01

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Vroom Development (Florida), Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final decision of the District Court of Appeal, Second District, State of Florida, denying Appellant's Motion for Rehearing, Motion for Rehearing En Banc, and Motion for Certification to the Florida Supreme Court, entered in this action on September 22, 1988.

This Appeal is taken pursuant to 28 U.S.C. 1257(2).

AFFIDAVIT OF SERVICE

STATE OF FLORIDA
COUNTY OF SARASOTA

On this day personally appeared Thomas F. Capshew, who was duly sworn and states that service of this Notice of Appeal to the Supreme Court of the United States was made by regular U.S. Mail on this 13th day of December, 1988, pursuant to Rule 10.2 and Rule 28.5(c) of the Supreme Court Rules, on Scott R. Christiansen, Esq., 1487 Second Street, Sarasota, Florida 34236 and Nancy E. Stroud, Esq., 1900 Glades Road, Suite 350, Boca Raton, Florida 33431. All parties required to be served have been served.

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SWORN TO and subscribed in my presence this 13th day of December, 1988.

/s/Sharon L. Gates (SEAL)
NOTARY PUBLIC STATE OF FLORIDA
My commission expires: May 30, 1990
Bonded through General Ins. Und.

Filed in Sarasota County Official Record Book 002083 at Page 000644 on December 13, 1988, at 4:57 p.m.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

VROOM DEVELOPMENTS
(FLORIDA), INC.,
Appellant,
v.
TOWN OF LONGBOAT KEY,
Appellee.

CASE NO. 87-2553

STATE OF FLORIDA
COUNTY OF POLK

I, WILLIAM A. HADDAD, Clerk of the Second District Court of Appeal for the State of Florida, hereby certify that the attached pages are true and correct copies of the following original documents filed in this office:

1. "Issue" page of Appellant's Initial Brief.
2. "Table of Contents" page of Appellee's Answer Brief.
3. "Table of Contents" page of Appellant's Reply Brief.
4. "Appellant's Motion for Rehearing" in its entirety.
5. Appellant's "Motion for Rehearing En Banc" in its entirety.
6. Appellant's "Motion for Certification" in its entirety.

WITNESS my hand and seal this 8th day of December, 1988.

SEAL) /s/ William A. Haddad, Clerk
SECOND DISTRICT COURT
OF APPEAL

SWORN TO and subscribed in my presence, this 8th day of December, 1988.

/s/Charles F. Weeks (SEAL)
Notary Public
My commission expires: September 29, 1989.

ISSUE

Whether Ordinance 81-27, applied by assessing the in lieu of land dedication fee on the value of the development land rather than the designated land, fails the "rational nexus" test or is otherwise improper?

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

VROOM DEVELOPMENTS
(FLORIDA) INC.,
Appellant,
vs. CASE NO. 87-2553
TOWN OF LONGBOAT KEY,
Appellee.

APPELLANT'S MOTION FOR REHEARING

Appellant, VROOM DEVELOPMENTS (FLORIDA) INC., moves this Honorable Court for a rehearing and shows:

1. This Honorable Court issued a per curiam affirmance in this case on June 24, 1988, a copy of which is attached.

2. This Court has either misapprehended or overlooked Appellant's argument in its Reply Brief (p. 17-19) as to the due process and equal protection arguments. Even if the Court determines that the Ordinance meets the "rational nexus" test, the Ordinance, as applied by Appellee, violates the equal protection and due process clauses of both the Florida (Art. I, Sec. 2, Sec. 9, Fla. Const.) and United States (U.S. Const. Amend. XIV, Sec. 1) Constitutions.

It is clear that the purpose of the Ordinance is to allow Appellee to acquire open space and park lands in order to keep pace with new development on Longboat Key. The "impact fee" in lieu of conveyance of property authorized by the Ordinance may only offset but not exceed the "impact" of new residents by funding the acquisition of recreational property. Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983); Contractors & Builders Ass'n v. City of Dunnedin, 329 So.2d 314 (Fla. 1976).

A. Equal Protection:

As the Ordinance is applied by Appellee, the amount of the impact fee to be paid is determined by the value of the land being developed.

Appellee's application of the Ordinance violates the equal protection clause of the Florida and U.S. Constitutions in that similarly situated developers who have the exact same population impact and would derive the exact same benefit are treated (or "taxed") differently. For example:

	Developer A	Developer B
Size of Property	1 acre	1 acre
Number of Units on Property	9	9
Location of Property	Bayside	Gulfside
Cost of Land to be developed	$100,000.00	$200,000.00
Fee in Lieu	x	2 times x

Therefore, Developer B, whose development has the exact same population impact as Developer A, is forced by Appellee to fund twice the amount of open space and park land acquisition as Developer A, in violation of the equal protection clause.

B: Due Process:

It is clear that in lieu impact fees, if properly enacted and properly assessed, can pass constitutional muster. See Hollywood, supra. An ordinance must give those affected by it notice of how it affects them. Put another way, if the affected party cannot ascertain from the face of the ordinance what assessment will be made on that party, then it is void for vagueness. Hartnett v. Austin, 93 So.2d 86 (Fla. 1956).

The Fifth District Court of Appeals in Opperman v. Nationwide Mutual Fire Insurance Co., 515 So.2d 263 (5th DCA 1987) most clearly stated the "plain meaning rule":

> When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So.2d 217 (Fla. 1984).
>
> Id. at 266, n.

Appellee, in enacting the Ordinance, recognized this "due process" requirement, and in Section B. 5(a), specifically provided:

> If . . . the proposed development does not include any land designated by the Open Space Master Plan . . . then the developer shall . . . pay a fee . . . equal to the value of the land acreage that would otherwise have been required to be conveyed . . . . (Emphasis added.)

A plain meaning reading requires the fee to be based upon the value of the "designated lands" which the Town admits it did not do when assessing the fee against Vroom and all others. This is a case of FIRST IMPRESSION in the State of Florida. All "impact fee" ordinances in Florida, whether for parks, open space or water, sewer, or other capital needs have met the DUE PROCESS requirement by (a) stating a plain meaning description of the assessment; and (b) applying the assessment in accordance with the description. Hollywood, Inc., supra and Contractors & Builders Ass'n v. City of Dunedin, 329 So.2d 314 (Fla. 1976) are consistent with this proposition.

Ordinance 81-27, given its plain meaning reading was unconstitutionally applied when Appellee assessed the fee based upon the value of land (within the development) which would not "otherwise have been required to be conveyed". Sec. B.5(a) and (b) of Ordinance 81-27. Alternatively, if the Court applies rules of construction to the Ordinance to authorize the assessment as made by Appellee, the Ordinance still fails the due process challenge because it fails to properly notify those affected as to how it affects them and is unconstitutionally vague.

The evidence unequivocally established Appellee's application of the assessment, and Appellee's evidence clearly established Vroom paid a fee equal to the cost to acquire 14 acres per 1000 residents or stated on a per unit basis, .028 acres per dwelling unit, when the standard is 5 acres per 1000 persons, or .01 acres per dwelling unit. Sec. B(4)(a) and (b) of Ordinance 81-27. (R. at 84). When Appellee's own expert's testimony is compared to the Hollywood evidence, the due process violation is glaring: (Hollywood, Inc. at 612).

	Hollywood, Inc.	Vroom
Standard	3 acres/1000 residents	5 acres/1000 residents (Stipulated as reasonable by the parties)
Amount actually assessed per evidence in each case.	"less than the standard" Id. at 612	14 acres/1000 residents R. at 84.

For these reasons, Appellee's Ordinance as applied or, alternatively, as interpreted violates the due process clause of the Florida (Art. I., Sec. 9, Fla. Const.) and United States (U.S. Const. Amend. XIV, Sec. 1) Constitutions.

3. This Per Curiam Affirmance adopts a lower court decision containing a MISCONCEPTION OF LAW and will engender enormous confusion in the law concerning impact fees in the State of Florida. Hollywood, supra and Dunedin, supra, had brought clarity to impact and in lieu fees, but neither case dealt with the vagueness, due process and equal protection issues Appellee created by its application of its ordinance. THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION, WHICH THIS COURT HAS OVERLOOKED.

The Circuit Court specifically acknowledged Appellant's challenges to Ordinance 81-27:

> 3. Plaintiff brought suit against the Town challenging the constitutionality of Ordinance 81-27. Plaintiff claims the Ordinance violates its due process and equal protection rights; that is unconstitutional, vague and indefinite; that it takes property without just compensation; and that it is an improper tax in violation of Article 7, Section 2 of the Florida Constitution."

Final Judgment, Para. 3, R. at 985.

The Circuit Court believed that the "rational nexus test" disposed of all of these constitutional challenges:

> Ordinance 81-27 passes federal and Florida constitutional muster if it meets the "rational nexus test" as analyzed in Contractors & Builders Ass'n. v. City of Dunedin, 329 So.2d 314 (Fla. 1976), and Hollywood, Inc., v. Broward County, 431 So.2d 606 (Fla. 4 DCA 1983).

Final Judgment, Para. 4, R. at 985.

THIS STATEMENT IS WRONG. Incredibly, the Circuit Court addressed only the taking and improper tax issues by application of the "rational nexus test" and held that since the Ordinance passed that test, it could not be constitutionally attacked on any other basis.

> Ordinance 81-27 meets the standards of the rational nexus test and is thus impervious to the constitutional attacks brought by plaintiff.

Final Judgment, Para. 8, R. at 986. This holding is based upon a misunderstanding of the reach of the rational nexus test. The Circuit Court thus ignored Appellant's vagueness, due process and equal protection challenges. This Court's decision in Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 312 So.2d 763, 767 (Fla. 2d DCA 1975), rem. on other grounds, 329 So.2d 314 (Fla. 1976) specifically acknowledges that other constitutional issues are not foreclosed just because an ordinance withstands the improper tax challenge.

The Circuit Court has thus established, as a rule of law, that an impact fee ordinance passes federal and Florida constitutional muster if it meets the "rational nexus test" regardless of whether or not the ordinance is unconstitutionally vague, or violative of due process or equal protection requirements. THIS IS A MISCONCEPTION OF LAW. The rational nexus test does not address the plain meaning of the ordinance, or whether the application of the ordinance has been consistent with its plain meaning, or whether those affected by the ordinance have sufficient notice as to its meaning. The rational nexus test does not address the fact that developments with equal impact are assessed different impact fees solely because their land values differ. In short, these issues are not resolved by application of the rational nexus test. THIS IS A CLEAR MISTAKE OF LAW WHICH MANDATES CORREC-

TION. This Court's Per Curiam Affirmance of such a gross misconception will no doubt delay the evolution of this important area of law in Florida until corrected by another Florida jurisdiction or perhaps a federal court.

4. The increasing use of impact fees creates an urgent need for an appellate level opinion analyzing the constitutionality of Appellee's method of assessing "impact fees", to fund a defined capital expenditure program. (Refer to Para 1 of Motion for Rehearing En Banc for further explanation).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 1st day of July, 1988 to: SCOTT CHRISTIANSEN, 1487 Second Street, Sarasota, Florida 34236; and NANCY E. STROUD, ESQUIRE, 1900 Glades Road, Suite 350, Boca Raton, Florida 33431.

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By: /s/ Jim D. Syprett
Attorney for Appellant

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

VROOM DEVELOPMENTS
(FLORIDA) INC.,
Appellant,
vs.
TOWN OF LONGBOAT KEY,
Appellee.

CASE NO.: 87-2553

MOTION FOR REHEARING EN BANC

Counsel for Appellant, VROOM DEVELOPMENTS (FLORIDA), INC., moves this Court for a rehearing en banc, and shows:

1. The Circuit Court opinion which this Court adopted as its opinion per curium affirmance conflicts with the Second District Court's City of Dunedin v. Contractors & Builders Ass'n, 312 So.2d 763 (Fla. 2nd DCA 1975), opinion by Judge Grimes, the logic of which was adopted by the Supreme Court, Contractors & Builders Ass'n v. City of Dunedin, 329 So.2d 314 (Fla. 1976). Dunedin's ordinance defined a specific capital expenditure program, i.e., water and sewer capital expansion needs due to new residents. Ordinance 81-27 defines a specific capital expenditure program, i.e., designated land for parks and open space needs due to new residents. THE FIRST IMPRESSION ISSUE here is created because Appellee bases the fee assessment to new residents on value of their land and NOT THEIR PRO RATA SHARE of the DEFINED CAPITAL EXPENDITURE PROGRAM. Judge Owens in the Final Judgment held "replacement cost" of existing parks, not projected cost of prospective capital acquisitions, was the proper test. (Paragraph 6 of Final Judgment). This conflicts with Judge Grimes' opinion, Dunedin, supra, p. 766 and 767, wherein he reasoned that the cost of prospective capital improvements was the appropriate measure of the pro rata share.

Judge Owens' Final Judgment in Paragraphs 3, 4, and 8 conflicts

with this Court's opinion in Dunedin, supra p. 767 wherein Judge Grimes acknowledged, even though the ordinances meets [sic] the taking and taxation tests (rational nexus), the constitutional issues must also be answered.

2. This Court's Per Curiam Affirmance specifically adopts a gross misconception of the law concerning impact fees. The lower Court, after acknowledging Appellant's taking, improper tax, vagueness, due process and equal protection constitutional challenges, held:

> Ordinance 81-27 meets the standards of the rational nexus test and is thus impervious to the vagueness, due process and equal protection constitutional attacks brought by plaintiff."

(Final Judgment, Paragraphs 3,8, R. at 985-986. This is simply not the law. Judge Grimes' opinion in Dunedin, supra at 767 acknowledged that even though an ordinance passes the taking and taxation tests (i.e. the rational nexus test), the other constitutional issues must be addressed. The rational nexus test is only designed to address the taking and improper tax constitutional challenges. The vagueness, due process and equal protection constitutional challenges are separate and distinct issues, and are not, and cannot be, subsumed within the rational nexus test.

3. I express a belief, based on a reasoned and studied professional judgment, that a panel decision is of exceptional importance.

4. I express a belief, based on a reasoned and studied professional judgment, that the arguments presented in the Briefs and in the attached Motion for Rehearing, show that this case is of exceptional importance in that impact fees are being assessed ever more frequently in this district, and an En Banc opinion other than a per curiam affirmance, whether an affirmance or a reversal, would be of great benefit to the bench and bar in determining the constitutionality of future impact fee assessments. Unless an opinion is rendered on the constitutional issues

ignored in the FINAL JUDGMENT, both Appellant and Appellee are left with unanswered questions which will cause further challenges and impair Appellee's ability to use funds it is holding, that were collected under protest.

/s/ Jim D. Syprett
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 1st day of July, 1988 to: SCOTT CHRISTIANSEN, ESQUIRE, 1487 Second Street, Sarasota, Florida 34236; and NANCY E. STROUD, ESQUIRE, 1900 Glades Road, Suite 350, Boca Raton, Florida 33431.

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By: /s/ Jim D. Syprett
Attorney for Appellant

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

VROOM DEVELOPMENTS
(FLORIDA) INC.,
Appellant,
vs.
TOWN OF LONGBOAT KEY,
Appellee.

CASE NO.: 87-2553

MOTION FOR CERTIFICATION

Appellant, VROOM DEVELOPMENTS (FLORIDA), INC., moves this Honorable Court for rehearing and respectfully requests that this Court withdraw its per curiam affirmance and issue an opinion certifying the following questions, or similar questions, to the Supreme Court of Florida as being questions of great public importance under Fla.R. App. P. 9.030(a)(2(A)(v):

QUESTION #1:
DOES A FINDING THAT AN IN LIEU IMPACT FEE ORDINANCE, SUCH AS ORDINANCE 81-27, SATISFIES THE RATIONAL NEXUS TEST, MAKE SUCH ORDINANCE IMPERVIOUS TO ALL OTHER CONSTITUTIONAL CHALLENGES SUCH AS VAGUENESS, DUE PROCESS AND EQUAL PROTECTION VIOLATIONS UNDER FEDERAL AND FLORIDA CONSTITUTIONS?

QUESTION #2:
IS THE TOWN'S APPLICATION OF ORDINANCE 81-27 REQUIRING A "FEE IN LIEU" OF LAND DEDICATION TO BE BASED UPON THE VALUE OF THE DEVELOPMENT LAND, RATHER THAN THE VALUE OF THE DESIGNATED PARK AND OPEN SPACE LAND INCONSISTENT WITH;

(1) THE PLAIN MEANING RULE;
(2) FEDERAL AND FLORIDA DUE PROCESS REQUIREMENTS; OR
(3) FEDERAL AND FLORIDA EQUAL PROTECTION REQUIREMENTS?

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 1st day of July, 1988 to: SCOTT CHRISTIANSEN, ESQUIRE, 1487 Second Street, Sarasota, Florida 34236; and NANCY E. STROUD, ESQUIRE, 1900 Glades Road, Suite 350, Boca Raton, Florida 33431.

SYPRETT MESHAD RESNICK & LIEB
1900 Ringling Boulevard
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(813) 365-7171

By: /s/ Jim D. Syprett
Attorney for Appellant

ORDINANCE NO. 80-1

AN ORDINANCE ADOPTING THE "OPEN SPACE MASTER PLAN;" AMENDING APPENDIX B, ZONING OF THE CODE OF THE TOWN OF LONGBOAT KEY, AS AMENDED BY ORDINANCE NO. 74-15, AS AMENDED BY ORDINANCE NO. 76-26, AS AMENDED BY ORDINANCE NO. 77-10, AS AMENDED BY ORDINANCE NO. 78-1, AS AMENDED BY ORDINANCE NO. 78-19, AS AMENDED BY ORDINANCE NO. 79-7; INCLUDING PROVISIONS REQUIRING CONVEYANCE OF LAND FOR PARKS, OPEN SPACE AND OTHER TOWN PURPOSES, INCLUDING PURPOSE, DEFINITIONS, REQUIREMENTS, GENERAL STANDARDS, FORMULA FOR CONVEYANCE OF LAND, FORMULA FOR FEES IN LIEU OF CONVEYANCE OF LAND; PROVISIONS FOR THE USE OF FEES, CRITERIA FOR CONVEYANCE AND FEES IN LIEU OF CONVEYANCE; PROVISIONS TO DETERMINE THE AMOUNT OF FEE IN LIEU OF LAND CONVEYANCE; CREDIT FOR PRIVATE OPEN SPACE; PROCEDURE FOR APPROVAL; PROVIDING FOR SEVERABILITY OF PROVISIONS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Town of Longboat Key has adopted a comprehensive plan, "The Town of Longboat Key 1978 Comprehensive Plan," and addendum, together with Natural Resources, Conservation and Coastal Zone Protection Elements, and a cpaital [sic] improvement program; and the Town of Longboat Key in implementation of portions of said comprehensive plan deems it necessary to enact this Ordinance and adopt a map entitled, "Open Space Master Plan";

WHEREAS, Chapter 166, Florida Statutes, empowers the Town of Longboat Key to enact a Zoning Ordinance and to provide for its administration, enforcement and amendment;

WHEREAS, the Town Commission deems it necessary, for the purpose of promoting the health, safety, morals, or general welfare of the Town to enact such amendments to the Zoning Ordinance of the Town of Longboat Key;

WHEREAS, the Planning and Zoning Board has made a preliminary report and held public hearings thereon and submitted its report to the Town Commission;

WHEREAS, the Town Commission has given due public notice of hearings and held such public hearings and considered, among other things, the availability of water and sewer services, traffic and traffic control, fire and police protection; and

WHEREAS, all the requirements of Chapter 166, Florida Statutes and Appendix B of the Code of the Town of Longboat Key, as amended, have been met; now, therefore,

BE IT ORDAINED BY THE TOWN OF LONGBOAT KEY:

Section 1. The map entitled "Open Space Master Plan" attached hereto is made a part of this Ordinance and hereby adopted. Said map properly attested shall be on file in the office of the Town Clerk inventorying land recommended for acquisition by the Town.

Section 2. Section 1 of Ordinance 79-7 is amended to read:

A. Purpose. This ordinance is enacted to ensure that future land development within the Town of Longboat Key preserves or provides land in its natural state for parks, open space and land for specified Town purposes required by the Longboat Key 1978 Comprehensive Plan, including Section 3 thereof entitled "Open Space and Recreation Element" and in the Capital Improvement Program of that Plan and are more particularly set forth in the "Open Space Master Plan" concurrently adopted with this Ordinance by the Town of Longboat Key.

B. Developers must provide for parks, open space and land for specified Town purposes:

1. Scope. The scope of this Ordinance is further to set forth certain regulations pertaining to land development within the Town, providing for parks, open space and land for specified Town purposes, which regulations shall be in addition to all other applicable building, subdivision, zoning and other regulations established by the Town or-

dinances. This Ordinance shall apply to and be enforced in all areas of the Town, and no persons shall develop land anywhere in the Town except in conformity with this Ordinance and other applicable regulations of the Code of Ordinances and amendments thereto.

2. Definitions for the purpose of this Ordinance.

(a) "Developer" shall mean any person, partnership or corporation undertaking any development as defined in this section.

(b) "Development" shall mean any subdivision, whether or not the recording of a plat is required; any land on which a multiple family dwelling unit residential building or grouping of such buildings or villas is to be built including but not limited to rental cooperative or condominium units and including land to be used for hotels and motels or individual dwelling. The term "Development" shall include any planned unit development or district which has received Outline Development Plan approval prior to the effective date of this ordinance, but has not received final (development) approval, where the amount of open space land in excess of open space land required by the Town building and zoning codes and regulations has not been (i) dedicated or deeded to the Town of Longboat Key; or (ii) is not part of the common land or elements or private land belonging to and owned by the unit owners or members of an association residing in such development. Such excess land shall be dealt with as "private land" under paragraph B. 10. of this section of this Ordinance.

3. Requirements. As a condition precedent to the grant of any permits following approval of final development plans, site plans or subdivision plats, the developer shall deed land to the Town of Longboat Key, pay a money fee in lieu thereof or provide a combination of the above at the option of the Town Commission, to be used for parks, open space and Town purposes specified in this Ordinance and according to the standards and formula set forth in this Ordinance.

4. General Standard; Formula.

(a) It is hereby found and determined that the public interest, convenience, health, welfare and safety require that two and one-half (2-1/2) acres of land or equivalent money value be deeded or paid to the Town for each one thousand (1000) persons residing in the Town to be

devoted for said park and open space purposes of this Ordinance and that two and one-half (2-1/2) acres of land or equivalent money value be deeded or paid to the Town for each one thousand (1000) persons residing in the Town to be devoted for said other purposes of this Ordinance, with the resulting cumulative standard of five (5.0) acres of land for each one thousand (1000) persons residing in the Town or equivalent money value as determined by the Town Commission as a standard to determine land to be conveyed.

(b) Formula for conveyance of land. To determine the amount of land for open space and specified Town purposes to be dedicated in accordance with the general standard of five (5.0) cumulative acres per one thousand (1000) persons, the following shall be used:

Average number of persons per dwelling unit divided by (1000 population, divided by acres of land required) equals acreage requirement per dwelling unit.

Example for single dwelling unit:

2.01 divided by 1000/5 + [sic] .010 acres per dwelling unit

(c) The following basis is to be followed in determining the amount of land to be included:

Dwelling type	Acreage Requirement/D.U.
Single Family	.01
Duplex	.01
Multi-family	.01

(d) For land zoned multifamily, the land dedication basis shall be applied to the number of dwelling units included in the final development plan.

(e) The land to be dedicated or conveyed to the Town may be located either within or outside of the boundaries of the property proposed for development.

5. Formula for Fees in lieu of land conveyance.

(a) If it is determined that the proposed development does not include any land designated by the Open Space Master Plan as open space or land for specified Town purposes, to serve the immediate and future needs of the Town residents and the developer is unwilling or unable to deed to the Town lands outside the proposed development that

are so designated, then the developer shall, in lieu of dedicating land, pay a fee to the Town equal to the value of the land acreage that would otherwise have been required to be conveyed as determined by the formula herein, and in an amount determined in accordance with the provisions set out below, such fee to be used by the Town for acquisition of land for parks, open space and specified town purposes which is intended to exclusively serve the residents of the Town of Longboat Key.

(b) The provisions of this subsection shall automatically apply to all developments of twenty-five (25) dwelling units or less.

6. Use of Fees. The fees collected hereunder shall be paid to the Town of Longobat Key at Town Hall, 501 Bay Isles Road, Longboat Key, Florida. All such fees shall be placed in a reserve account within the General Fund which shall be known as the Reserve for Lands for parks, open space and specified town facilities required as capital improvements. Monies within the Reserve Account shall be used and expended solely for the acquisition, improvement, expansion of Town Parks, open space land and land for specified Town purposes and facilities required as capital improvements of the Town of Longboat Key.

7. Criteria for Requiring Both Conveyance and Fee. In any development of over twenty-five (25) dwelling units, the developer may be required to convey land and pay a fee in accordance with the following formula:

(a) When only a portion of the land which the developer is required to convey for parks, open space and specified Town purposes is to be conveyed, such portion shall be conveyed for local open space or specified Town purposes and a fee computed pursuant to the provisions set out herein shall be paid to the Town for any additional land that the developer would otherwise have been required to convey hereunder.

(b) When most of the land designated as parks, open space and land for specified Town purposes in the vicinity of the proposed development has already been acquired by the Town and only a small remaining portion of the land in the proposed development is needed to complete the site, such remaining portion shall be conveyed by the developer and a fee shall be paid by the developer in lieu of conveying

the additional land which would otherwise have been required to be conveyed, such fees to be in an amount equal to the value of the additional land which the developer would otherwise be required to convey and such fees to be used for the improvement of the existing Town parks, open space land and land specified for Town purposes or for the improvement of other Town parks, open space land and land for specified Town purposes in the area serving the development.

8. If the developer objects to the fair market value determination, he may submit an MAI appraisal showing the fair market value of the lands required to be donated and final determination of said market value per acre of such land shall be made by the Town Commision based upon such information submitted by the developer. Should the developer's MAI appraisal not be acceptable to the Town, the Town shall appoint another MAI apraiser. The Town's MAI appraiser and the developer's MAI appraiser shall select a third MAI appraiser and the fair market value of the lands required to be conveyed, as determined by the three appraisers, shall be binding upon the developer and the Town. The cost of any appraisal shall be a credit against any fees.

9. Determination of Land or Fee. The Town Commission shall determine whether to accept land or require payment of the fee in lieu thereof, after consideration of the following:

(a) Topography, geology, access and location of land in the development available for dedication;

(b) Size and shape of the development and land available.

(c) The feasibility of conveyance;

(d) Availability of previously acquired parks, open space property and land for specified Town purposes;

(e) Whether the developer owns or controls other land designated in the "Open Space Master Plan" or other lands.

10. Credit for Private Open Space. Where private open space is provided in a proposed or existing planned unit development or district and such space is to be privately owned and maintained by the future residents of the development, partial credit, not to exceed fifty percent (50%) of the amount of land required to be conveyed, may be given against the requirements of land to be conveyed or payment of fees in

lieu thereof if the Town Commission finds it is in the public interest to do so. Private open space is that open space which is set aside for the common enjoyment of the residents of the project, and does not include required yards, parking, court areas, setbacks, and other open areas required by zoning and building ordinances.

11. Procedure.

(a) In the case of a subdivision for which a plat is required to be recorded, as a condition of preliminary plat approval the developer shall agree in writing to convey land for parks, open space and land for specified Town purposes, pay a fee in lieu thereof, or both, at the option of the Town Commission at the time and according to the standards and formula in this Ordinance after a recommendation from the Town Manager and approved by the Town Commission at the time of approval of the subdivision preliminary plat. At the time of approval of the final subdivision plat, the developer shall convey the land and pay the fees as previously determined by the Town Commission.

(b) In the case of a subdivision for which a plat is required to be recorded, as a condition of preliminary plat approval, the developer shall agree in writing to convey land for parks, open space and land for specified Town purposes, pay a fee in lieu thereof, or both, at the option of the Town Commission at the time and according to the standards and formula in this Ordinance after a recommendation from the Town Manager and approved by the Town Commission at the time of approval of the subdivision preliminary plat. At the time of approval of the final subdivision plat, the developer shall convey the land and pay the fees as previously determined by the Town Commission;

(c) In the case of a subdivision for which a plat is not required to be recorded, or in the case of any development other than a subdivision, at the time of final approval of this final development plan or site plan, or on application for a building permit, the developer shall convey land, pay a fee in lieu thereof, or both, at the option of the Town as determined by the Town Commission in accordance with this Ordinance.

Section 3. If any section, subsection, sentence, clause, or provision of this Ordinance is held invalid, the remainder of the Or-

dinance shall not be affected.

Section 4. All ordinances and parts of ordinances in conflict herewith shall be and the same are hereby repealed.

Section 5. This Ordinance shall take effect upon second reading in accordance with law, and the Charter of the Town of Longobat Key.

Passed on first reading this 19th day of March, 1980.

Passed and adopted finally on second reading this 2nd day of April, 1980.

/s/ J. Kennedy McCall
Mayor

Attest:
/s/ E. Jane Pool
Town Clerk

ORDINANCE NO. 81-27

AN ORDINANCE AMENDING APPENDIX B, ZONING OF THE CODE OF THE TOWN OF LONGOBAT KEY, AS AMENDED BY ORDINANCE NO. 74-15, AS AMENDED BY ORDINANCE NO. 76-26, AS AMENDED BY ORDINANCE NO. 77-10, AS AMENDED BY ORDINANCE NO. 78-1, AS AMENDED BY ORDINANCE NO. 78-19, AS AMENDED BY ORDINANCE NO. 79-7, AS AMENDED BY ORDINANCE NO. 80-1, AS AMENDED BY ORDINANCE NO. 80-3, AS AMENDED BY ORDINANCE NO. 80-8, AS AMENDED BY ORDINANCE NO. 80-9, AS AMENDED BY ORDINANCE NO. 81-1, AS AMENDED BY ORDINANCE NO. 81-18; PROVIDING FOR AN AMENDMENT TO ORDINANCE NO. 79-7, AS AMENDED BY ORDINANCE NO. 80-1 and ORDINANCE NO. 80-9 OPEN SPACE REQUIREMENTS; PROVIDING FOR SEVERABILITY OF PROVISIONS; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT HEREWITH AND PROVIDING AN EFFECTIVE DATE.

BE IT ORDAINED BY THE TOWN OF LONGBOAT KEY:

Section 1. Section 1 of Ordinance 79-7, as amended by Section 2 of Ordinance No. 80-1, as amended by Section 1 of Ordinance No. 80-9, is amended to read:

A. Purpose: This ordinance is enacted to ensure that future land development within the Town of Longboat Key preserves or provides land in its natural state for parks and open space required by the Longboat Key 1978 Comprehensive Plan, including Section 3 thereof entitled "Open Space and Recreation Element" and in the Capital Improvement Program of that Plan and are more particularly set forth in the "Open Space Master Plan" concurrently adopted with Ordinance

No. 80-1 of the Town of Longboat Key.

B. Developers and landowners, including builders of residences on single family lots, must provide for parks and open space.

1. Scope. The scope of this Ordinance is further to set forth certain regulations pertaining to land development and construction within the Town, providing for parks and open space, which regulations shall be in addition to all other applicable building, subdivision, zoning and other regulations established by the Town ordinances. This ordinance shall apply to and be enforced in all areas of the Town, and no persons shall develop land, nor construct any single family residence, anywhere in the Town except in conformity with this ordinance, and other applicable regulations of the Code of Ordinances and amendments thereto.

2. Definitions for the purpose of this ordinance.

(a) "Developer" shall mean any person, partnership, corporation, or trustee, undertaking any development as defined in this section.

(b) "Development" shall mean any subdivision, whether or not the recording of a plat is required; any land on which a multiple family dwelling unit, residential building or grouping of such buildings or villas is to be built, including but not limited to rental cooperative or condominium units and including land to be used for commercial condominiums, hotels and motels or individual dwellings, the latter including the construction of a single family residence on single family lot or lots.

The term "Development" shall include any planned unit development or district and gulf planned unit development or district, or part thereof.

3. Requirements. As a condition precedent to the grant of any permits following approval of final development plans, site plans, subdivision plats, or issuance of a building permit, the developer shall deed land to the Town of Longboat Key, pay a money fee in lieu thereof or provide a combination of the above, at the option of the Town Commission, to be used for parks and open space specified in this Ordinance and according to the standards and formula set forth in this Ordinance.

4. General Standard; Formula.

(a) It is hereby found and determined that the public interest, convenience, health, welfare and safety require that five (5) acres of land or equivalent money value be deeded or paid to the Town for each one thousand (1,000) persons residing in the Town to be devoted for said park and open space purposes of this ordinance.

(b) Formula for conveyance of land. To determine the amount of land for parks and open space to be conveyed in accordance with the general standard of five (5) cumulative acres per one thousand (1,000) persons, the following shall be used:

Average number of persons per dwelling unit divided by (1,000) population, divided by acres of land required, equals acreage requirement per dwelling unit.

Example for single dwelling unit:

2.01 divided by 1,000/5 = .010 acre per dwelling unit

(c) The following basis is to be followed in determining the amount of land to be included:

Dwelling type	Acreage Requirement/D.U.
Single Family	.01
Duplex	.01
Multi-family	.01

(d) For land zoned multifamily, the land dedication basis shall be applied to the number of dwelling units included in the final development plan.

(e) The land to be conveyed to the Town may be located either within or outside of the boundaries of the property proposed for development.

5. Formula for Fees in lieu of land conveyance.

(a) If it is determined that the proposed development does not include any land designated by the Open Space Master Plan as open space, to serve the immediate and future needs of the Town residents and the developer is unwilling or unable to deed to the Town lands outside the proposed development that are so designated, then the developer shall, in lieu of conveying land, pay a fee to the Town equal to the value of the land acreage that would otherwise have been required

to be conveyed as determined by the formula herein, and in an amount determined in accordance with the provisions set out below, such fee to be used by the Town for acquisition of land and parks and open space which is intended to exclusively serve the residents of the Town of Longboat Key.

(b) The provisions of this subsection shall automatically apply to all developments of twenty-five (25) dwelling units or less.

6. Use of Fees. The fees collected hereunder shall be paid to the Town of Longboat Key at Town Hall, 501 Bay Isles Road, Longboat Key, Florida. All such fees shall be placed in a reserve account in trust within the General Fund and shall be known as the Reserve for Lands for parks and open space. Monies within the Reserve Account shall be used and expended solely for the acquisition, improvement, expansion of Town Parks and open space land.

7. Criteria for Requiring Both Conveyance and Fee. In any development of over twenty-five (25) dwelling units, the developer may be required to convey land and pay a fee in accordance with the following formula:

(a) When only a portion of the land which the developer is required to convey for parks and open space is to be conveyed, such portion shall be conveyed for parks or local open space and a fee computed pursuant to the provisions set out herein shall be paid to the Town for any additional land that the developer would otherwise have been required to convey hereunder.

(b) When most of the land designated as parks and open space in the vicinity of the proposed development has already been acquired by the Town and only a small remaining portion of the land in the proposed development is needed to complete the site, such remaining portion shall be conveyed by the developer and a fee shall be paid by the developer in lieu of conveying the additional land which would otherwise have been required to be conveyed, such fees to be in an amount equal to the value of the additional land which the developer would otherwise be required to convey and such fees to be used for the improvement of the existing Town parks and open space land or for the improvement of other Town parks and open space land in the area ser-

8. If the developer objects to the fair market value determination, he may submit an MAI appraisal showing the fair market value of the lands required to be donated and final determination of said market value per acre of such land shall be made by the Town Commission based upon such information submitted by the developer. Should the developer's MAI appraisal not be acceptable to the Town, the Town shall appoint another MAI appraiser. The Town's MAI appraiser and the developer's MAI appraiser shall select a third MAI appraiser and the fair market value of the lands required to be conveyed, as determined by the three appraisers, shall be binding upon the developer and the Town. The cost of an appraisal shall be a credit against any fees.

9. Determination of Land or Fee. The Town Commission shall determine whether to accept land or require payment of the fee in lieu thereof, after consideration of the following:

(a) Topography, geology, access and location of land in the development available for dedication;

(b) Size and shape of the development and land available.

(c) The feasibility of conveyance;

(d) Availability of previously acquired parks and open space property.

(e) Whether the developer owns or controls other land designated in the "Open Space Master Plan" or other lands.

10. Credit for Private or Public Open Space. Where private or public open space is provided in a proposed or existing planned unit development or district in excess of the then requirement of Section 7.52, or any amendment thereof, of the zoning code, partial credit, not to exceed fifty percent (50%) of the amount of land required to be conveyed may be given against the requirements of land to be conveyed or payment of fees in lieu thereof if the Town Commission finds it is in the public interest to do so. Such space does not include required yards, parking, court areas, setbacks, and other open areas required by zoning and building ordinances.

11. Procedure.

(a) In the case of a subdivision for which a plat is required to be recorded, as a condition of preliminary plat approval, the developer

shall agree in writing to convey land for parks and open space, pay a fee in lieu thereof, or both, at the option of the Town Commission at the time and according to the standards and formula in this ordinance after a recommendation from the Town Manager and approved by the Town Commission at the time of approval of the subdivision preliminary plat. At the time of approval of the final subdivision plat, the developer shall convey the land and pay the fees as previously determined by the Town Commission, but not later than issuance of a building permit.

(b) In the case of a planned unit development for which a condominium plat is required to be recorded, as a condition of site approval, the developer shall convey land for parks and open space, pay a fee in lieu thereof, or both, at the option of the Town Commission and according to the standards and formula in this ordinance after a recommendation from the Town Manager and approved by the Town Commission at the time of approval of the site plan, but not later than issuance of a building permit.

(c) In all other cases, at the time of final approval of the final development plan or site plan, or on application for a building permit, the developer shall convey land, pay a fee in lieu thereof, or both, at the option of the Town as determined by the Town Commission in accordance with this Ordinance.

Section 2. If any section, subsection, sentence, clause, or provision of this ordinance is held invalid, the remainder of the ordinance shall not be affected.

Section 3. All ordinances and parts of ordinances in conflict herewith shall be and the same are hereby repealed.

Section 4. This ordinance shall take effect upon second reading in accordance with law and the Charter of the Town of Longboat Key.

Passed on first reading this 2nd day of September, 1981.

Passed and adopted finally on second reading this 16th day of September, 1981.

/s/ Claire C. Bell
Mayor

Attest:
/s/ E. Jane Pool
Town Clerk

Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1059

In The
Supreme Court of the United States
October Term 1988

VROOM DEVELOPMENTS (FLORIDA), INC.,
Appellant,

vs.

TOWN OF LONGBOAT KEY,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

MOTION OF APPELLEE THE TOWN OF LONGBOAT KEY TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the lower Florida courts correctly determined that the Town of Longboat Key's application of Ordinance 81-27 complied with all pertinent state and federal constitutional requirements.

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No. 88-1059

In The

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VROOM DEVELOPMENTS (FLORIDA), INC.,

Appellant,

vs.

TOWN OF LONGBOAT KEY,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

MOTION OF APPELLEE THE TOWN OF LONGBOAT KEY TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, appellee the Town of Longboat Key ("Town") moves to dismiss the appeal of Vroom Developments (Florida), Inc. ("Vroom"). The motion to dismiss is based on appellant's failure to present a substantial federal question to this Court. In the alternative, the Town moves under Rule 16.1(d) to affirm the judgment of the Florida Second District Court of Appeal, entered June 24, 1988 and reported at 531 So. 2d 974 (Fla. 2d DCA 1988). This opinion affirmed, per curiam, the judgment of the trial court on the ground that the decision below is manifestly correct and does not present a substantial federal question warranting plenary briefing and argument on the merits.

STATEMENT OF FACTS

This case arises out of a garden-variety developer's dispute with a town's land development regulations requiring the dedication of land for parks and open space. The Town of Longboat Key has operated a program for many years to ensure that sufficient park and recreational land facilities are available to meet the needs of both existing and new residents. The challenged regulation, Ordinance 81-27 (the "Ordinance"), provides a method by which the Town can acquire land for parks and open space to serve the Town's expanding population.

The Ordinance requires that developers of land must deed to the Town five acres of land for every one thousand persons to be added to the Town's population as a result of the proposed development. Vroom stipulated at trial that the standard of five acres per 1000 persons is reasonable, and does not challenge that standard here. App. 23. This standard is expressed in a formula contained in the ordinance that results in a dedication requirement of one hundredth of an acre for each residential dwelling unit in the proposed development.

The Town had earlier adopted an Open Space Master Plan (the "Plan") to aid developers and Town officials in identifying those lands most suitable for Town acquisition. The Ordinance provides that the developer may dedicate land designated in the Plan, or may pay a fee-in-lieu of the land requirement. If the fee in lieu of the land dedication is paid, the fee amount is based on the fair market value of the amount of acreage required by the formula. The per acre value is based on the value of the land to be developed.

Rather than dedicate land, Vroom opted to pay an in lieu fee of $61,962.35 for its twenty-six unit Longboat Cove condominium project on August 25, 1980 and a $21,-448.44 in lieu fee for its nine unit condominium Pelican Harbor project on January 29, 1981. Neither of these projects contained lands recommended for purchase in the Plan. There is no evidence in the record that Vroom attempted to dedicate land either on its property or otherwise in the Plan to satisfy its land dedication requirement. Nor is there evidence that Vroom requested an amendment to the Plan, as others have done in the past, to add to the Plan other land suitable for acquisition by the Town and otherwise available to Vroom for dedication.

Vroom paid the in lieu fee to the Town under protest and subsequently filed a declaratory judgment action on October 4, 1984. Vroom alleged that the Ordinance violated constitutional guarantees of due process and equal protection, that it was unconstitutionally vague and indefinite, that it constituted a taking, and that it was an invalid tax.

Vroom's position at trial was that in order to meet constitutional requirements, the in lieu fee must be based on the value of those specific lands recommended for purchase in the Plan. Its expert appraisal witness testified that the value of such land per square foot was $1.00, although he admitted that he appraised only one parcel on the Plan and had not made a determination of the value of the total amount of land that the Town should acquire. App. 2-3, 5. Vroom's expert furthermore testified that the only method he would advise for calculating the fee was the method used by local governments to calculate special assessments. App. 4, 5, 17-19. The Town's expert testified

that this method was not used for purposes of land dedication ordinances by any local government of which he was aware. App. 19. Vroom's expert presented no evidence in rebuttal to the Town's expert's testimony.

The evidence at trial established that Vroom's fee offset, but did not exceed, the park and open space needs attributable to Vroom's two projects. The fee paid by Vroom, using the value of the land to be developed, was no greater than the per dwelling unit cost of parks and open space currently provided the existing population. App. 13, 14. The trial court accepted the testimony of appellee's expert land economist that the Town's fee was reasonable, based on an accepted methodology for fees of this kind known as the "per capita" or "replacement" methodology. App. 7-13, 15, 16. The Town's ordinance thus was shown to meet the constitutional requirements of rationality, as it was reasonably related to the cost of serving needs created by Vroom's new development.

ARGUMENT

Introduction

Vroom has failed to present any substantial federal issue to this Court. This already overburdened Court should not accept jurisdiction of this common land use dispute simply to "reinforce the fact that citizens of this nation have federal constitutional rights separate from, and independent of, state constitutional rights." J.S. at 9. Vroom's federally secured rights of due process and equal protection were fully considered by the lower state courts. There remains no issue worthy of this Court's attention.

I. The Application of Ordinance 81-27 to Vroom's Development Results in a Constitutionally Acceptable Fee

The Town's application of its land dedication ordinance is typical of ordinances used and accepted throughout the country requiring land dedication or in lieu fees. In those ordinances, the in lieu fee is calculated on the basis of the fair market value of the amount of land on site that otherwise would be required to be dedicated. *See Associated Home Builders, Inc. v. City of Walnut Creek,* 484 P.2d 606, *cert. dismissed,* 404 U.S. 878 (1971); *Coulter v. City of Rawlins,* 662 P.2d 888, 893-894 (Wy. 1983); *Call v. City of West Jordan,* 606 P.2d 217 (Utah 1979); *Collis v. City of Bloomington,* 246 N.W.2d 19 (Minn. 1976) (en banc). *Cf., Brookhill Development, Ltd. v. City of Waukesha,* 299 N.W.2d 610 (Wis. App. 1980) (fee in lieu of school land dedication). The lower courts properly rejected Vroom's argument that the only reasonable method for calculating the fee is to follow the method used for establishing special assessments. Special assessments for specific local projects are easily distinguishable from other regulatory fees enacted to pay for the costs of capital expansion required by new development. *Contractors and Builders Ass'n of Pinellas County v. City of Dunedin,* 329 So.2d 314, 319 n. 8 (Fla. 1976), *cert. denied,* 444 U.S. 867 (1979).

Vroom's fee did not exceed the cost of providing the capital facilities required by its development. It is, in fact, less than what it would cost the Town to replace, on a per capita basis, the existing park and open space land acquired by the Town. That is all the due process and equal protection to which the developer is entitled.

Vroom's fee—$2,762.00 per dwelling unit—did not exceed $2,996.00 per dwelling unit, which was the Town's current per dwelling unit investment in parks and open space. App. 9-11. Contrary to the suggestion in its first question presented, Vroom paid no more than its pro rata share of capital facilities required by its development.

II. The Fee Computation Requirements of Ordinance 81-27 are Constitutionally Valid

Vroom's second question presented claims that the Town Ordinance is unconstitutional because it "exacts the fee based upon the value of the development land." Vroom has misread the ordinance to state "that an impact fee shall be based upon the value of the designated park land" and claims that the Town has thus invalidly applied the Ordinance.

Section 9.e. of the Ordinance clearly contemplates that the Town may wish to accept "other lands" than those on the Plan. The Town has in fact accepted such other lands when offered. App. 25. R. 163. Vroom confuses a Town preference for lands on the Plan for a prohibition against accepting lands that are not on the Plan. The courts below properly read the Ordinance to require that the fee-in-lieu be based on the fair market value of the land to be developed, and found this requirement to be constitutionally valid. The significance of the Plan is that it provides guidance to the Town and to developers who may wish to purchase and dedicate those lands to satisfy the parks and open space needs of new development. The lower courts properly did not require the Plan to be used in any other way and neither, as a constitutional matter, should this Court.

III. Vroom's Due Process and Equal Protection Guarantees Were Fully Considered by the Lower Courts Through Their Analysis of the Rational Nexus Test

The rational nexus test employed by the Florida Court and other courts throughout the nation to test the constitutional validity of in lieu fees is not simply "a state constitutional test." J.S. p. 7. It is a test designed to insure that developers pay no more than their fair share of the amount needed to fund capital facilities necessitated by their developments. *See e.g., Home Builders and Contractor Association of Palm Beach County, Inc. v. Palm Beach County,* 446 So.2d 140 (Fla. 4th DCA 1983), *pet. for rev. denied,* 451 So.2d 848 (Fla. 1984); Juergensmeyer, Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla. St. U.L. Rev. 415 (1981). It thus is designed to inherently consider the very due process and equal protection concerns raised by appellant. *Id.; Hollywood, Inc. v. Broward County,* 431 So.2d 606, 610-612 (Fla. 4th DCA 1983); *Associated Home Builders, Inc. v. City of Walnut Creek,* 484 P.2d 606, *cert. dismissed,* 404 U.S. 878 (1971); *Call v. City of West Jordan,* 606 P.2d 217 (Utah 1979). This is especially true since Florida's due process and equal protection guarantees are virtually identical to the federal guarantees on which they are based. FLA. CONST. art. 1, § 2, § 9. Indeed, federal due process and equal protection decisions are often cited as dispositive precedent in cases construing Florida's corresponding guarantees. *See e.g., Florida High School Activities Ass'n. v. Thomas,* 434 So.2d 306, 308-09 (Fla. 1983).

Moreover, the rational nexus test employed by the Florida courts is substantially the same as the federal con-

stitutional test applied to a land dedication ordinance in *Nollan v. California Coastal Commission,* — U.S. —, 107 S. Ct. 3141 (1987). In *Nollan,* the court stated that its constitutional test "is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts," citing to a Florida case which applied the rational nexus test. *See* 107 S. Ct. at 3141. Indeed, the cited case reviewed the earlier Longboat Key parks and open space land dedication ordinance under the rational nexus test applied in *Hollywood, Inc.* Thus, the lower courts' review under the rational nexus test in this case could hardly fall more squarely into the constitutional review standard established by this Court.

Vroom's third question presented thus reflects a complete misunderstanding of the rational nexus test. An analysis of Ordinance 81-27 under the rational nexus test incorporates the same analysis as that for a federal constitutional challenge. The trial court found there to be no violation under state or federal constitutional law, and the appellate court affirmed without opinion. The constitutional questions have been presented, considered, and rejected by every court to examine this action. Vroom has completely failed to articulate a reason for this Court to accept jurisdiction of this common and unimportant developer's dispute.

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CONCLUSION

For the foregoing reasons, Vroom's appeal should be dismissed, or in the alternative, the decision of the Florida Second District Court of Appeal entered June 24, 1988 should be affirmed.

Respectfully submitted,

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January, 1989

APPENDIX

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

VROOM DEVELOPMENTS (FLORIDA), INC.,

Plaintiff,

-vs- Case No. 84-3836

TOWN OF LONGBOAT KEY,

Defendant.

_____/

Transcript of the proceedings in the above-entitled cause before the Honorable Andrew Owens, Circuit Judge, at the Sarasota County Courthouse, Sarasota, Florida, on January 14, 1987.

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(p. 52) Jew Fish Key and Lyons Lane?

A No. I have seen one of the appraisals but I did not conduct a formal review.

MR. SYPRETT: Your Honor, the other appraisals to which he's making reference are contained in our Exhibit No. 9.

Q (BY MS. STROUD) But the only lands you actually appraised were Lyons Lane and Jew Fish Key?

A Jew Fish Key I didn't actually appraise it, it was strictly a review.

Q So, you appraised one of the lands designated on the open space master plan?

A Yes, Ma'am.

Q And in terms of the value of other lands on the open space master plan, did you make a determination of that value?

A No, I did not.

Q So you do not then have an idea of what the value of the total amount of land that the Town of Longboat Key wishes to acquire is?

A To the best of my knowledge no one has formally appraised that, so I don't have that figure.

Q Do you know what the current Town inventory of parks and open space lands is?

A I have seen a figure. I don't recall off the top (p. 53) of my head, but I have seen that.

Q But which parcels of land on that open space master plan are currently owned by the Town of Longboat Key?

A I have also seen a document that illustrates the properties owned by the Town of Longboat but I don't have that in my possession. Mr. Syprett may have that with him.

Q Did you make a calculation or appraisal of the value of the land that is owned by the Town of Longboat Key and used for parks and open spaces?

A No, I did not.

Q Have you made an appraisal of the value of the improvements on park or open space land that the Town of Longboat Key has acquired?

A No, I have not.

Q You have testified as to a way to calculate an impact fee or a fee in this case to acquire land and open spaces. Is that the only way, to your knowledge, that there is to calculate such a fee?

A If you were attempting to realistically charge people for what is truly being acquired, it is the only way I can even advise.

Q Have you ever worked for a local government and assisted them in the preparation of a land dedication ordinance?

A I worked a little with Dr. Nicholas in density (p. 54) transfer situations which, I believe, was a part of a dedication, but that was for Lee County, but to any extent, not much of any.

Q So, you have never been responsible for making a calculation for a fee for parks and open space for any local government?

A I have appraised a number of properties for the local government when they are doing it, but they do the mathematics.

Q You have never been employed to assist a local government in determining a proper methodology for a park and open space land dedication fee?

A Not to my knowledge, no, I have not.

Q Have you had any formal training or experience outside of the State of Florida in determining what is the proper methodology for a land dedication fee?

A Outside the State of Florida, no, I have not.

Q Have you ever been employed by a local government in Florida to assist them in the methodology for establishing an impact fee?

A No, I have not.

Q Are you aware of the difference between an impact fee and a land dedication ordinance?

A Not from a legal standpoint, no.

Q From any standpoint?

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(p. 63) Q Have you made any calculations of the value of that one hundred and twenty-six acres that should be acquired?

A That would have to be done before I could tell you how much the impact fee should be.

Q And you have not done that?

A I have not done that.

MS. STROUD: Thank you, Your Honor.

MR. SYPRETT: Your Honor, the documents, for your information, that have been admitted into evidence show areas mapped for acquisition that total probably two hundred and twenty acres, and that is contained in the

testimony that has been put in as an exhibit, so the shaded areas that are shown on this map total almost one hundred acres more than can be legitimately acquired under the impact fee ordinances that we are talking about because the Town's standards still only allow for acquisition of one hundred and twenty-six based on five acres, which is what they said each one thousand needs. So, much of the open space you're looking at has to be acquired under other approaches, and I would have just about three or four questions for Mr. Sewell.

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(p. 84) THE COURT: I think that would really go to legal argument, so I'll go ahead and let him testify.

Q (BY MS. STROUD) In order that we are clear about the procedure by which you have determined this acreage currently existing in Longboat Key for park and open space purposes, can you briefly summarize again what your procedure for coming up with that figure was?

A First, we simply went to the inventory and found out that there is currently existing one hundred and eighty-seven acres of park and open space. By referring to the 1980 census together with the building permit reports filed to determine that as of 1984, the last year for which there is complete data, there were six thousand six hundred dwelling units, residential units, on Longboat Key. At 2.01 persons per unit it yields a population of thirteen thousand two hundred. One hundred and eighty-seven acres for thirteen thousand two hundred people is approximately fourteen acres per one thousand population. That is what the Town of Longboat Key is presently doing.

But, more importantly, Your Honor, at least as to my calculations, is when we look to what is the worth of those one hundred and eighty-seven acres, of course we have several bases to do it, one is we look back to what the Town actually paid for some reasonable proxy thereof which would be the assessed value (p. 85) of the open spaces, and the land area is worth fifteen million dollars.

MR. SYPRETT: Excuse me, Your Honor, I'm going to object to the witness testifying to land value because I don't think he has been qualified as an appraiser for land value purposes, and unless we are given some source of the basis for the figures, it must be presumed that he is testifying as to land value.

MS. STROUD: Your Honor, Dr. Nicholas has been offered and accepted as an expert in land economics, and if Mr. Syprett would like, we will ask Dr. Nichols about the sources bases of his calculations, but I believe this is entirely relevant and competent testimony.

MR. SYPRETT: If he has not been tendered as an appraiser and she's calling on him for appraisals, then I think he needs to be further qualified. He was qualified in the category that she referred to, nor is he licensed as a broker yet to testify to in the record which one of the fields. In essence, one of the functions of a real estate broker is the ability to do appraisals and appraise other persons' lands and to testify to that (p. 86) fact, and that has not been established.

THE COURT: I don't know how you can be a land economist without dealing with the value of the land. Since he was recognized as a land economist, I assume his opinion would have to be based on the appraisals, and if

you wish to show they are inaccurate. I think you would be entitled to do that, but at this point I will allow him to go ahead and testify.

Q (BY MS. STROUD) Dr. Nicholas, you had begun to explain a procedure by which now shifting over from the area type of valuation you went to a value of property valuation. Can you explain to the Court the procedure in which you did that calculation?

A First, we got the areas from the Town inventory of the property they own or that were owned by other entities that made them available for parks and open space. The values here were one of three sources. One source would be the actual acquisition cost that the Town had paid from those records. Second would be appraisals made, I believe in every case, at the initiation of the Town by an appraiser, a qualified appraiser. The third source is the tax roles, the appraised value as stated on the tax roles. So I attempted to do no appraisals on my own but made use of (p. 87) those sources. When we sum them, the land in current inventory is worth fifteen million dollars. For six thousand six hundred dwelling units that is an average per dwelling unit of two thousand seven hundred and forty-seven dollars. That is strictly dealing with land. Or it is a value per acre that is two thousand two hundred and seventy-six dollars per dwelling unit as it exists, or per acre eighty thousand two hundred and eighty-one dollars.

The second point I wish to make here is that some of these appraisals were made as late as 1973 or as long ago as 1973. Some of the properties were acquired in 1980 or before. The property appraiser in Manatee County

has not changed the appraisals of these publicly owned properties since 1984. I am somewhat concerned that this was an extremely conservative, in fact, perhaps even to the point of being a biased assessment of value, so I attempted to bring these forward to a current value and all I did was use a simple ten percent per year since the indicator of value is to try to establish a base, and which is also called a current value. The current value of the properties would be eighteen million or fifteen million. The value of these properties per dwelling unit would be two thousand seven hundred and sixty-two dollars, and the value per acre would be ninety-seven thousand four hundred and twenty-four dollars, again emphasizing we are looking here strictly at (p. 88) the properties that are currently in inventory.

MR. SYPRETT: Excuse me, Your Honor, I would object to that and move to strike. He's bringing forth the values on that because that did require effectively a property appraisal by him to do so.

THE COURT: All right. I'll deny that. I think it all goes to credibility.

Q (BY MS. STROUD) Dr. Nicholas, is it your testimony that the twenty-seven hundred eighty-two dollar figure that you just mentioned was an average cost per dwelling unit?

A Yes, that's an average of all the six thousand six hundred dwelling units on Longboat Key.

Q Did you calculate a cost on the Plaintiff's Longboat Cove and Pelican Harbor projects?

A Yes.

Q Can you explain to the Court how you did that?

A Of course. When we look at an average, we recognize that there are effects around the average, you look at the nature of these particular properties and they would fall generally in the low to mid-rise development, two and three bedrooms and relatively large dwelling units. What we know from the census and numerous other studies that the larger the unit in terms of the number of bedrooms, (p. 89) the more people generally occupy that unit. Additionally, the larger the unit in square footage, the more people tend to occupy it. Referring back to the 1980 census of housing, we can determine the number of people we would expect to live in a mid-rise two bedroom and a mid-rise three bedroom home on Longboat Key, and doing that the average of all of the units developed here you would expect to get 2.077 persons per unit as distinct from the average of 2.01 for the Town, so it is simply recognizing these units developed here are slightly greater in size and, therefore, demographic impact than the average.

Q Using a 2.077 estimated population per unit on Longboat Cove or Pelican Harbor, what would be the cost under your cost calculations for those properties?

MR. SYPRETT: Excuse me, I object to that. It is irrelevant and immaterial because the ordinance uses 2.01. That is what the effect is calculated on, what the fee is based on.

THE COURT: You may be right. I'm just hearing it for the first time. I'll have to weed that out, if you are correct, but I think it is appropriate at this time and I

will allow him to present that. You may very well be correct in your position that the Court should not consider that. Go ahead.

(p. 90) A The unadjusted value is simply looking at prices paid when acquired or assessed value would go from two thousand two hundred and seventy-six dollars per dwelling unit to two thousand three hundred and fifty-two. The current estimate would go from a dwelling unit cost of two thousand seven hundred and sixty-two to two thousand eight hundred and fifty-five dollars for the Longboat Cove or Pelican Harbor units.

THE COURT: I didn't understand that.

A These units are slightly larger, Your Honor, and we would expect them to have slightly more people. Therefore, if we're going to provide five acres per thousand, we would expect them to have a slightly higher cost than the average.

THE COURT: All right.

Q (BY MS. STROUD) In your study of the cost of providing open space and park land in Longboat Key did you determine a value of improvements for that park and open space land?

A I attempted to try to.

Q Please explain how you did that study.

A To begin with a park or open space is more than simply the land area. It includes various improvements, parking spaces, walkways, et cetera. In our inventory of the Town facilities we do not have an accurate inventory of (p. 91) what improvements have been made. I was

only able to identify with specificity two improvements. First would be the value of the construction of the bike paths, which is eight hundred and forty-four thousand dollars, and second, is the cost of constructing the dune walkovers, which are fourteen at fifty thousand dollars each, for a total cost of seven hundred thousand dollars. Therefore, Your Honor, the improvements which currently exist that I was able to identify are equal to one thousand five hundred and forty-four dollars.

MR. SYPRETT: For the record, Your Honor, I renew my objection. It is irrelevant and immaterial. It is not part of the specified lands or referred to in the ordinance.

THE COURT: Thank you.

Q (BY MS. STROUD) To be clear, the one thousand and more figure that you just cited, would you cite that figure again?

A The known improvements is what I'm calling them, one million five hundred and forty-four thousand dollars.

Q Using those total known improvement costs, did you calculate a value per dwelling unit of those costs?

A Yes, I did.

Q What was the result of your calculation?

A Aggregating the land costs with the improvement (p. 92) costs the average dwelling unit which, Your Honor, would be equivalent to 2.01 population figure, using the acquisition cost basis for the land, the cost per dwelling unit was two thousand five hundred and ten dollars. Bringing the land cost up to current value, the average

cost, again on the 2.01 figure, would be two thousand nine hundred and ninety-six dollars. If we look at the cost of the Town to a slightly larger unit, that is in the case of Pelican Harbor, those costs would now be on the base value or original cost of the land two thousand five hundred and ninety-four dollars, current value of the land three thousand and ninety-six dollars.

Q Dr. Nicholas, in performing this study, did you use facts and data that are reasonably relied upon by expert land economists in performing studies of this type?

A Yes, I used the U.S. Census, I used building permit reports, which are federal documents, I used appraisals, which I believe are all in the record, and I used other matters, the public records such as the assessed value of property, all very reasonable sources.

Q Based on your background, your training and expertise, your study of the parks and open space capital facility needs of the Town of Longboat Key, and your knowledge of the fees paid by Vroom Development, Inc., do you have an opinion as a land economist as to the

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(p. 96) greater than the fees which Pelican Harbor or Longboat Cove were required to pay.

Q Dr. Nicholas, in doing your study is it your testimony that you used a population standard of 2.01 persons per dwelling unit to derive an average cost to buy parks and open space per dwelling unit?

A Yes. When I simply refer to the cost per dwelling unit, that is the 2.01 standard as set out in the ordinance.

Q And will you explain, just to be clear to the Court and there is a continuing objection, what the bases of your cost calculations were?

A The cost calculations again were simply the summation of the area and the value of those properties divided by the number of dwelling units. So, here we simply have a per dwelling unit cost very simply, and at that point it makes no difference how many people are in it, divide fifteen million or eighteen million by six thousand three hundred. The ordinance, however, specifies that the average occupancy is 2.01, so that we can link those two together, which is what I would do there and which I did. However, when we start looking at what a specific individual paid, now that specific individual might pay an average payment, a below average payment or above average payment, so now we're not looking to generalities, we're looking to (p. 97) what a specific individual pays because we well know the fee can vary from unit to unit, and as I understood the question with respect to this property owner was what were the costs that the Town could expect to incur for this development rather than for the average development, so we have to look at the nature of the development, first, what did it pay, and, second, what would it cost to service. So, that's why I shifted from the average of 2.01 persons per unit to 2.077 to try to compare apples to apples here, what this particular property owner paid versus the cost the Town would incur. Otherwise, Your Honor, the scene would have to be average against average, when you're looking at what is the average cost at the same time we're looking at what is the average receipt. Alternatively if we're looking at what is a particular payment, we should be looking at what would

be the particular cost associated with that payment. That's the reason I did it in the manner in which I did it.

Q Dr. Nicholas, the method which you described to calculate both the average cost and the cost for this particular Plaintiff's property, is that method one that you have used in other local jurisdictions for studies of this type?

A Yes.

MR. SYPRETT: I object to that as irrelevant and immateril, Your Honor.

(p. 98) THE COURT: Overruled.

A Yes, I have done a number of park impact fee ordinances, and every park impact fee I have done has used this method, which is simply called the per capita method. It probably is the most commonly used method. In fact, of the existing park impact fee ordinances all use it to one extent or another.

Q In what jurisdictions have you used this method of calculating the cost?

A Monroe County, Broward County, Harden County, St. Lucie County, Lee County, Charlotte County, Hernando County, Citrus County. There are a couple of others, of course. I think I said Broward?

Q Yes. Thank you, Dr. Nicholas. Is the method that you described of having been used in Broward, was that method described to the Court in your expert testimony before the Court in the case of Hollywood, Inc., versus Broward County?

A Yes, the testimony I gave in that case was a per capita cost analysis, but then we look at how those costs

would vary by different types of dwelling units to try and show that there was an attempt at proportionality, recognizing that some units impose more costs than others, therefore, we would expect the fees should have some degree or proportionality as opposed to fixed that every dwelling

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(p. 101) Q (BY MS. STROUD) Dr. Nicholas, in your studies and work with impact fees are you familiar with a concept of replacement costs?

A Yes.

Q Can you explain to the Court how your methodology relates to this concept of replacement costs?

A This methodology is frequently referred to as replacement cost, that if the community were to double in size, we would expect we would have to totally replace through addition the existing park structure. That's where it came from, the replacement cost concept. But we would expect that as new people come in, as new development occurs, that they would maintain the park standard or simply replace their particular increment and then we would use the existing system as the basis to establish a standard.

Q Has this replacement cost method been used in your work for Palm Beach County?

A Yes.

Q Can you describe in what particular work in Palm Beach County it has been used?

MR. SYPRETT: I just want to reaffirm that my standing objection to all this line of questions still exists as to relevancy and maturiality.

THE COURT: I forget it, but now you have re-reaffirmed it I remember you were making all those

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(p. 103) cost of acquiring that future inventory land; secondly, a calculation was made on the build-out population expected in that local jurisdiction, with no particular date of that build-out population; assume the third step was calculating the per capita cost at build-out using those first two steps, and that per capita cost became then the fee charged to the new development to pay open space and recreation. Based on your background, training and experience in the conduct of public capital facility financing studies, would the study described be a valid approach to determining the share of the cost of capital expansion required because of new development?

A No.

MR. SYPRETT: I object to the form of the question and it's relevancy and materiality as worded and phrased because it deals with generalities, and the facts given aren't sufficient to make it relevant or material to the issues involved in this suit.

THE COURT: Overruled.

A Methodologically I find no fault with that. Methodologically it is a reasonable way to go about it. In fact, while that method is not used by any local governments I'm aware of in Florida, I personally would have

attempted to use it, was not able to. Methodologically, I think it is (p. 104) sound.

Q Do you have knowledge of a financing technique called special assessment?

A Yes.

Q What is the definition of a special assessment?

A It is a charge imposed upon benefitted property that recoups some or all of the costs incurred to create that benefit.

Q What is the method for calculating a special assessment?

A You define first the improvement to be delivered, and second create a role of the property to be benefitted, and in the amount of the benefit, and you divide through the cost by whatever unit you're using on the role, be it per acre, or per dollar of value or whatever, and then determine a charge for whatever unit you are assessing on the basis of it.

Q What similarity does that method have to the hypothetical set of facts that I presented to you?

A Well, generally speaking that is what one would do if one were going to use the special assessment approach to those costs. You would then have to identify specifically what was going to be acquired and put its value down, specifically who was to be benefitted. Then you divide the cost by the benefitted unit, and then the

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(p. 106) units, buyers toward single family homes. What is it going to be during the '90's? Will we see Town or any unit of build-out at zoned densities or not, are we going to see pressure toward rezoning, I don't know. What my work has always been structured to is to the development approach that responded to recognizing in the future things are going to change, rather than a role, if you will, here is what we're going to do, it's immutable, we think it is immuntable forever. I think there is a problem that, as I mentioned, Your Honor, I personally won't try to do one of these approaches where we're going to identify everything and add it all up, and I was soundly criticized, interestingly enough, mainly by the representative of the home building industry on the basis that it was speculative. How am I supposed to know, or anybody is supposed to know, in the future what parks are going to be needed, what their costs are going to be, how much development is going to occur. It's one of those reasons I personally totally avoid it. To the best of my knowledge, nobody uses that approach for an actual ordinance. It's commonly used for special assessments, for short term programs where you know exactly what you want, you can describe your role exactly. And that situation is very common. But an impact fee approach I've never seen it used.

Q Dr. Nichols, has it been your experience in your

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(p. 112) Q From whom did you get the figure that you used? You didn't get it from Solin?

A No, I went to the Census of Housing and used the 1980 census number of dwelling units. My second

source was to go to the building permit records of how many units had been permitted, added the two together and came up with six thousand six oh eight. I could not confirm the Solin figure, I did not use it.

Q The Solin figure is the City's figure that they apparently paid an extensive amount of money for; is that right?

A I'm not saying, yes, it's wrong; I'm simply saying I could not confirm it.

Q You did not run your figures using nine thousand rather than sixty-six hundred, did you?

A No.

Q This particular ordinance, the ordinances that we're dealing with here, adopted specific land which the Town desires to acquire, is that correct, on that map, or have you dealt with the map enough to be able to answer the question?

A I think you have two questions in one.

Q Does this map designate the land which the Town desires to keep as open space land?

A It designates land that the Town wishes to have (p. 113) as open space recreation.

Q This ordinance as well as that map was done to implement the open space plan; is that correct, excuse me, the 1978 comprehensive plan?

A I believe so, yes.

Q In section three of that it says, the following objectives shall constitute the Town's open space and recre-

ation policy; one, consider all wetlands part of the Town's permanent open space system; two, develop techniques for preserving vital areas in their natural state; three, develop passive parks for relaxation and nature study; and, four, consider amendments to develop regulations for mandatory dedication of park land or a payment in lieu thereof. Is that right?

A Um-hum (in the affirmative.)

Q Those are all objectives for the future acquisition of additional properties; is that correct?

A I concluded it to be that.

Q One can then take the open space master plan which had been adopted at the same time and look at the identified lands, determine which ones were already owned and then know which ones that comprehensive plan states as an objective they want the Town to acquire; is that correct?

MS. STROUD: Your Honor, I object to this

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(p. 116) future, does it not?

MS. STROUD: Objection, Your Honor. That's calling for a legal conclusion as to what the effect of the ordinance is. That is a subject for legal argument and not for Dr. Nicholas's testimony. In fact, Dr. Nicholas on direct has not put any evidence in at all about what the ordinance requires.

MR. SYPRETT: Much to my chagrin sometimes, Your Honor, expert witnesses can give opinions on the issue that is to be tried.

THE COURT: Yes, I understand that, but, in other words, as I understand the question you're asking is that they have this map and they show on this map the property they have already bought, and they show on the map the property that they want to buy, they have this purpose, and so, therefore, we have to just do the fees to buy just those properties; is that essentially where we're going?

MR. SYPRETT: For purposes of calculating certain fees in the future, yes. I'm ultimately going to get to that point, but I have to ask a couple of preliminary questions.

THE COURT: As I understood, Dr. Nicholas's testimony was, given the uncertainty that these (p. 117) things are always subject to amendment and so forth, so I would assume that you have got to start somewhere, and so that map would always be subject to change. Maybe I'm missing the point.

MS. STROUD: Your Honor, that is part of our legal argument, in fact, that the map is there as a guidance, and that's not anything on which Dr. Nicholas can testify. If he is asking the expert to assume certain facts—

THE COURT: I think Mr. Syprett can use Dr. Nicholas'. You have used Dr. Nicholas, he gets to use him free and you have to pay, but to testify in Mr. Syprett's theory of the case; I'm not sure which one I'm going to adopt as being correct, but at this point I will overrule your objection.

Q (BY MR. SYPRETT) Dr. in some of the record evidence that we have already put in, it is indicated to

us that these dark areas shown on the map for acquisition for open space total about two hundred and twenty acres. You have testified that one hundred and eighty-seven are already owned so much of that one hundred and eighty-seven apparently does no lie within these acres; is that correct?

A There are properties in open space recreation use

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(p. 135) light of the field in which she has been recognized as an expert in, it would seem to me all of her testimony would center around the standard of five acres per thousand people in population, if I'm not mistaken, and we have stipulated in our brief and otherwise with opposing counsel that we accept the standard of five acres per thousand as a reasonable standard, and that is the only standard dealt with in the ordinance, and the only acreage figures in the ordinance that have any relevance or materiality to any issue in the suit, so if that's the purpose of her testimony will be to establish that, then we have already stipulated to that and we advised opposing counsel of that quite a long time ago or quite sometime ago in days and weeks.

MS. STROUD: Your Honor, my purpose in bringing Mr. Satterthwaite is to explain to the Court the use of parkland dedication and fees in lieu ordinances which are commonly used in the field of recreational planning, and she is also available to testify to the standard of five acres per one thousand. If we are not permitted to put

in that testimony, that's fine, but I would like to bring Ms. Satterthwaite for that other purpose

* * *

(p. 146) be landscaped.

Q That already exists out there, does it not?

A There is one six feet wide and they are thinking of widening it to eight feet because it has heavy use from joggers, walkers, bikers, so that may well be widened, and there is also a need for landscaping along it, and the Town is also considering putting a path on the other side of the Gulf of Mexico Drive.

Q On the open space master plan the bike route is not designated on that, is it, as, quote, land recommended for Town acquisition?

A No, but that master plan is what I consider a base guideline, and I think since that plan was prepared that bicycle path has proved so popular they recognize the need to improve it.

Q You do recognize the ordinance that adopted that master plan the lands designated on there as the ones to be acquired?

A That's right, but that I would consider a guideline, and the work that is needed is basically improvement, not necessarily land acquisition.

MR. SYPRETT: I don't have any other questions.

THE COURT: Do you have any redirect?

* * *

(p. 163) Q But only thirty-four acres was taken for purposes of open space and the other twenty acres were taken for purposes of other capital improvements, were they not?

A I believe the way that read in the deed and donation agreement that the Town presented all of it was for open space purposes.

Q The Arvida agreement has been put into evidence. Referring to paragraph C on page four, it says as to the Town comprehensive plan and open space master plan adopted by the Town pursuant to the comprehensive plan shall be amended by the Town so as to accomplish the following; add to the Town's open space master plan that portion of the aforementioned fourteen acre tract which is not presently included in the plan, and simply delete another place that was. And on the dedication part of it here it says the fourteen acre parcel—excuse me—

MS. STROUD: Your Honor, may I ask where in the agreement?

THE COURT: You may.

MS. STROUD: On what page are you reading from the agreement?

THE COURT: Did you get that?

Q (BY MR. SYPRETT) So, having read that portion, does that sufficiently advise you that on the fourteen acres—

* * *

Supreme Court, U.S.
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No. 88-1059

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

VROOM DEVELOPMENTS (FLORIDA), INC., *Appellant*,

v.

TOWN OF LONGBOAT KEY, *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

REPLY BRIEF IN OPPOSITION OF MOTION OF APPELLEE THE TOWN OF LONGBOAT KEY TO DISMISS OR AFFIRM

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February 1989

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Ordinance No. 80-1, Town of Longboat Key 1

Ordinance No. 81-27, Town of Longboat Key 1

Pursuant to Rule 16.5, appellant, VROOM DEVELOPMENTS (FLORIDA), INC. files this Reply Brief in Opposition to Motion of Appellee THE TOWN OF LONGBOAT KEY to Dismiss or Affirm ("Motion to Dismiss") (referenced as M.D. p. _____ in this brief).

Appellee's Motion to Dismiss distorts and obfuscates the questions presented to this Court by appellant in its Jurisdictional Brief. The facts of the case are simple. Appellee enacted an Ordinance. The Ordinance was enacted "to ensure that future land development within the Town of Longboat Key preserves or provides land in its natural state for parks, open space and land for specified town purposes. . . ." Ordinance No. 80-1, Section 2(A), J.S. app. p. 28a. Concurrent with the adoption of Ordinance 80-1, the Town adopted a map entitled "Open Space Master Plan" ("Map"). *Id.* The Map's purpose was to inventory "land recommended for acquisition by the Town." *Id.* The Ordinance requires any new development either to dedicate land inventoried on the Map or to pay a fee in lieu of dedication ("impact fee"). The requirement is imposed to offset the impact of new population.

Appellant agrees that dedicating designated open space or paying an impact fee to acquire the designated open space is related to the burden of increased population. The essence of this appeal is that developments with the same new population impact should be assessed the same impact fee. The cost of acquiring the land designated on the Ordinance's Map is the same for twenty-five (25) people living on expensive gulf-side property as it is for twenty-five (25) people living on less expensive bay-side property.

Appellee makes much of the fact that the actual fee assessed against appellant was less than the replacement cost of the lands currently being used by appellee for recreational purposes. Appellee ignores the fact that appellee itself created the standard of five (5) acres of land per one thousand new residents. Ordinance 81-27, Section 1(B)4(a), J.S. app., p. 37a. Replacement cost analysis has only one application: determining how many acres of land are needed to offset population increases. Appellee's replacement cost analysis argument is irrelevant to this appeal for two reasons: (1) the standard is set by the

Ordinance at five (5) acres per 1,000 persons (not the replacement cost ratio of fourteen (14) acres per 1,000 persons); and (2) the Ordinance does not call for the replacement of current parklands, but the acquisition of specifically designated land. Appellee has adopted an Ordinance stating that impact fees for parkland will be assessed based upon five (5) acres per 1,000 persons and now argues to this Court that their assessment of an impact fee nearly three times that standard meets constitutional muster because the fee assessed is less than the replacement value of currently used parkland (having a ratio of fourteen (14) acres per 1,000 persons). Appellee admits in its Motion to Dismiss that it charged appellant nearly fourteen (14) acres per 1,000 persons when the rate established by appellee in its Ordinance is five (5) acres per 1,000 persons.

Appellee also argues that the Map adopted in the Ordinance is only for "guidance". (M.D., pp. 2, 6). If the Map is only for guidance, why does appellee have to amend the Map to add dedicated lands not designated and delete an equal amount of designated lands? (*See* M.D. app. p. 25).

No state or federal appellate court has written on the issues presented in appellant's Jurisdictional Statement. None of the cases cited by appellee in its Motion to Dismiss have addressed the issues in this appeal. In fact, the Ordinance in the first case cited by appellee in support of its argument on page five (5) of the Motion to Dismiss does *not* require an in lieu fee calculated on the fair market value of the land being developed:

> The fee to be paid by a subdivider with less than fifty parcels is calculated not by the value of the land he would have been required to dedicate within a subdivision but by the value of the land in the portion of the local park required to serve the needs of the subdivision.

Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal.3rd 633, 94 Cal.Rptr. 630, 484 P.2d 606, 614 n. 11, cert. dismissed, 404 U.S. 878 (1971). That is precisely the application that appellant seeks in this case.

The issues raised in this appeal were not addressed in any of the other cases cited by appellee. In *Coulter v. City of Rawlins*, 662 P.2d 888 (Wy. 1983), the court stated, "The issue which we are asked to address is whether or not the City of Rawlins was empowered by the Wyoming Constitution and various statutes to enact and enforce the three ordinances in question." *Id.* at 894. The court went on to state, "The briefs and the propositions expressed at oral argument reflect that appellant is not challenging the reasonableness of the amount of the charges and is only concerned with the power of the City of Rawlins to adopt them." *Id.* at 894, n. 1. The issues before this Court have nothing to do with appellee's power to adopt the challenged ordinances. In *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979), the issues before the court were: (1) whether the city had the power and authority to adopt the Ordinance; (2) whether the dedicated land or fee in lieu thereof must exclusively benefit the created subdivision; (3) whether the requirements of the Ordinance constituted a "taking"; and (4) whether the requirements constituted a tax. *Id.* at 218. None of those issues are raised here. In *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976), both the state statute and the municipal ordinance were challenged as a "taking" without just compensation. 246 N.W.2d at 21-22. The state statute was also challenged as an improper delegation of authority to a municipality and the ordinance was challenged as outside the scope of the enabling legislation. *Id.* Again, none of those issues are the subject of this appeal. Finally, in *Brookhill Development, Ltd. v. City of Waukesha*, 99 Wis. 2d 485, 299 N.W.2d 610 (Wis. App. 1980), affirmed, 103 Wis. 2d 27, 307 N.W.2d 242 (1981), the issues were: (1) whether the municipality had the authority to enact the subject ordinance; (2) whether the Ordinance was properly enacted; (3) whether the ordinance could be applied to land outside the municipality's territorial limits; and (4) whether the developer was denied equal protection because the developer's interests were not represented during the enacting process. *Id.* Those issues are not present here.

Appellee miscites this Court's opinion in *Nollan v. California Coastal Commission*, _____ U.S. _____ , 107 S.Ct. 3141 (1987) for the proposition that this Court has addressed the issues raised in this

appeal as it relates to Florida's rational nexus test. (M.D., p. 8). The *Nollan* case dealt with whether a requirement to convey an easement for beach access resulted in a "taking" in violation of the Takings clause of the Fifth Amendment. That constitutional principle is not invoked here.

Appellee repeatedly characterizes this case as a "garden variety developer's dispute" (M.D., p. 2), a "common land use dispute" (M.D. p. 3), and a "common and unimportant developer's dispute" (M.D., p. 8). The Ordinance challenged in this case is characterized by appellee as a "typical ordinance" (M.D., p. 4). It is respectfully submitted that there is no better case upon which this Court can decide substantial federal Constitutional questions than a "common" dispute involving a "typical" ordinance. Plenary briefing, full argument on the merits, and a written opinion on the federal Constitutional questions presented in this appeal would provide guidance to every court in this nation called upon to address this admittedly ubiquitous situation. A decision by this Court outlining the federal Constitutional parameters of a "typical" ordinance would stem the tide of federal Constitutional challenges of impact fees and would have widespread precedental value.

Finally, appellee argues in its Motion to Dismiss that the federal Constitutional questions were decided by a Florida trial court and a Florida court of appeal, thereby implying that nothing more is needed. (M.D., p. 8). Appellee's argument fails to consider the Constitutional principle reiterated by this Court in *Cooper v. Aaron*, 358 U.S. 1 (1958):

> The federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land, and Art 6 of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Id. at 18.

CONCLUSION

It is respectfully submitted that appellant's Jurisdictional Statement has presented substantial federal Constitutional questions that warrant plenary briefing and argument on the merits before this Court.

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AFFIDAVIT OF SERVICE

STATE OF FLORIDA
COUNTY OF SARASOTA

On this day personally appeared Thomas F. Capshew, who was duly sworn and states that service of this Reply Brief in Opposition of Motion of Appellee the Town of Longboat Key to Dismiss or Affirm was made by regular U.S. Mail on this ____ day of February, 1989, pursuant to Rule 28.5(c) of the Supreme Court Rules, on Scott R. Christiansen, Esq., 700 Sarasota Quay, Sarasota, Florida 34236 and Nancy E. Stroud, Esq., 1900 Glades Road, Suite 350, Boca Raton, Florida 33431. All parties required to be served have been served.

_____

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SWORN TO and subscribed in my presence, this _____ day of February, 1989.

_____

NOTARY PUBLIC